87-1269

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; LEO HIMMELSBACH, District Attorney of Santa Clara County;

Appellants,

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT AND VOLUME I OF THE APPENDIX

JOHN K. VAN DE KAMP
Attorney General of the State of California

N. EUGENE HILL
Assistant Attorney General

GEOFFREY L. GRAYBILL*
Deputy Attorney General

1515 K Street
P. O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5465

Counsel for Appellants

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

The California Elections Code contains dozens of provisions pertaining separately to each of its ballot-qualified political parties and several which pertain to such political parties generally. Of these provisions, only those prescribing the membership of the state central committees of the California Democratic and Republican parties, the term of the chairpersons of the California Republican and Libertarian party state central committees and proscribing endorsement by state and county party central committees of candidates for the party's nomination for partisan office in the primary election were invalidated by the courts below.

Do these invalidated provisions constitute substantial and impermissible infringements on the First Amendment rights of the affected political parties and their members where the provisions reflect the policies of the parties, were enacted at their request and are necessary to enable them to enforce their policies in state courts.

Do these provisions constitute such infringements where a state provides the candidates of political parties with access to its general election ballot through means other than the primary election without regulation of the parties but reserves the privilege of state-conducted nomination elections and automatic access of candidates so nominated to the general election ballot to political parties which adhere to such provisions enacted to promote the state's interest in a stable and democratic system of government.

TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	4
STATEMENT OF THE CASE	6
FEDERAL QUESTIONS ARE SUBSTANTIAL	18
CONCLUSION	23
APPENDIX (Volume I)	1a
APPENDIX (Volume II) (under separate cover)	a-1

TABLE OF AUTHORITIES

Page

CASES CITED

American Party of Texas v. White, 415 U.S. 767, ftn. 15 (1974) 9, 14, 21

Anderson v. Celebrezze, 460 U.S. 780, ftn. 30 at 803 (1983) 9

Malone v. Superior Court, 40 Cal.2d 546; 254 P.2d 517 (1953) 13

Marchioro v. Chaney, 442 U.S. 191 (1979) 16

People v. Crutcher, 262 Cal.App.2d 750; 68 Cal. Rptr. 904 (1968) 12

Storer v. Brown, 415 U.S. 724, 736 (1974) 7, 20

Tashjian v. Republican Party of Connecticut, 479 U.S. —, 107 S.Ct. 544 (1986) ..... *passim*

CODES, STATUTES AND OTHER AUTHORITIES

California Elections Code

§ 501 ..... 7, 8

§ 6400 20

§ 6430 ..... 6, 7

§ 6430(b) 5

§ 6430(c) 5

§ 6495 ..... 5, 7

§ 6501 ..... 5, 7

§ 6610 ..... 5, 6

§ 8660 5

§ 8661 5

§ 8663 15

§ 8664 15

TABLE OF AUTHORITIES—Continued

	Page
§ 8665	5
§ 8667	5
§ 8669	5
§ 8774	15
§ 8775	3, 16
§ 8870 et seq.	17
§ 8920	17
§ 8940	16, 17
§ 9160	5
§ 9160.5	5
§ 9161	5
§ 9161.5	5
§ 9162	5
§ 9163	5
§ 9164	5
§ 9274	5
§ 9276	16, 17
§ 9420	17
§ 9440	16
§ 9688	16
§ 9724	15
§ 9740	16
§ 9816	5, 15
§ 9819	14
§ 9850	16, 17

TABLE OF AUTHORITIES—Continued

	Page
§ 10200.5	5, 7
§ 11700 et seq.	11
§ 11701(3)	11
§ 11702	5, 9, 13, 17
§ 11703	11
§ 11704	11
§ 11705	11
§ 11708	11
§ 11709	11
§ 17100	20
§ 29102	5
§ 29430	5
42 U.S.C. § 1983	3, 4
Fed. R. Civ. P. 56(f)	13
U.S. Constitution, First Amendment	3, 4, 18, 19, 21
U.S. Constitution, Fourteenth Amendment	3, 4
Hill, Gladwin, *Dancing Bear: An Inside Look At California Politics* (World Publishing Co. 1968)	12, 15, 22
Ranney, A., *Curing the Michiefs of Faction* 201 (1975)	8
Scott and Carr, "Political Parties Before the Bar: The Controversy Over Associational Rights", 5 Univ. of Puget Sound L. Rev. (1982)	8, 14

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is set forth in volume I of the Appendix (I App.) hereto at pp. 2-41 is reported at 826 F.2d 814.[1]

The orders and judgment of the United States District Court for the Northern District of California are not reported. They are set forth at II App. 42-78.

JURISDICTION

March Fong Eu, Secretary of State of the State of California, John K. Van de Kamp, Attorney General of California, Leo Himmelsbach, District Attorney of the County of Santa Clara, and Arlo Smith, District Attorney of the City and County of San Francisco, the appellants, appeal from the final judgment of the United States Court of Appeals for the Ninth Circuit, filed Augsut 18, 1987 and amended October 29, 1987.

The judgment is subsequent to an order of this Court issued in this case on January 12, 1987, vacating the judgment of the Ninth Circuit and remanding to it for further

1. Appellants have reproduced the appendix of their original appeal to this Court in this case (Docket # 86-434) as volume II of the appendix to this appeal (II App.). Volume II is bound separately from this jurisdictional statement but volume I is bound herewith. The original appeal resulted in an order of this Court issued January 12, 1987, vacating the judgment of the Court of Appeals and remanding the case for further consideration in light of *Tashjian v. Republican Party of Connecticut*, 479 U.S. —, 107 S.Ct. 544 (1986).

consideration in light of this Court's decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. —, 107 S.Ct. 544 (1986). The judgment of the Ninth Circuit reaffirms its previous judgment affirming summary judgment entered by the United States District Court for the Northern District of California on April 16, 1984.

The judgment of the Northern District held that provisions of the California Elections Code prescribing the membership of the state central committees of the California Republican and Democratic parties, the terms of the chairpersons of the state central committees of the California Libertarian and Republican parties and prohibiting endorsements by state and county central committees of primary ballot-qualified political parties of candidates for their respective party's nominations at the primary election violated the Freedom of Speech and Free Association Clauses of the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and 42 United States Code section 1983, were therefore invalid and enjoined appellants from enforcing said provisions.

The Court of Appeals had jurisdiction pursuant to 28 United States Code section 1291 and Federal Rules of Civil Procedure section 54(b). By order issued on October 29, 1987, the Court of Appeals denied appellants' petition for rehearing with suggestion for rehearing en banc. (I App. 5)

By order filed November 17, 1987, the Court of Appeals denied appellants' motion to stay issuance of its mandate pursuant to Rule 41(b), Fed. R. App. P. until

final disposition of an appeal to this Court. (I App. 61-62) Notice of appeal to this Court was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on November 19, 1987 and an amended notice of appeal was filed on January 14, 1988. (I App. 54-60) Appellants' application to Justice Sandra Day O'Connor for a stay of the mandate was denied on December 4, 1987, after consideration of the written opposition of appellees.

This appeal is being docketed in this Court within 90 days from the entry of judgment below. The jurisdiction of this Court is invoked pursuant to 28 United States Code section 1254(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . .

Fourteenth Amendment, United States Constitution:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 United States Code section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

California Elections Code sections:

8660, 8661, 8663, 8664, 8665, 8667 and 8669 (membership of the Democratic State Central Committee);

9160, 9160.5, 9161, 9161.5, 9162, 9163 and 9164 (membership of Republican State Central Committee);

9274 (term of chairperson of Republican State Central Committee);

9816 (applicable to term of chairperson of Libertarian State Central Committee);

11702 (prohibits endorsement by party state and county central committees of candidates for the party's nomination for partisan office at the primary elecion);

29102 (provides penalties for violations of laws relating to elections);

29430 (provides a penalty for claiming an endorsement as official candidate of political party in the primary election).

The text of the foregong provisions of the California Elections Code and provisions thereof which were challenged but not invalidated in this litigation are set forth in II App. 288 et seq. A chart summarizing all of the provisions of the Elections Code, not challenged or invalidated below, relating directly to the California Democratic Party is set forth at I App. 63 et seq.

STATEMENT OF THE CASE

As the opinion of the United States Court of Appeals for the Ninth Circuit in this case notes, at the turn of this century California adopted a direct primary election system "which transferred the power to nominate candidates from party organizations to the voters themselves." (I App. 11)

The system is "closed" in the sense that only voters who are officially registered with state election agencies as being affiliated with a particular party may vote the ballot of that party in the primary election conducted by the state for the nomination of the party's candiates for partisan office. (Cal. Elec. Code § 501) The candidate who receives the most votes in the primary election conducted for a party for a particular office is the only candidate who may be designated on the general election ballot as the candidate of that party for that office. (Cal. Elec. Code § 6610)

However, the state does not conduct primary elections for all political parties. Only those parties which meet criteria of demonstrable support among the voters of the state are eligible to have their nominating elections conducted by the state. (Elec. Code § 6430)

Political parties may choose not to avail themselves of the state-conducted primary elections to select their candidates for office. The state provides these parties with other means of placing their candidates on the general election ballot although the candidates' party affiliations do not appear on the ballot. Such parties are not subject to regulation by the state as political parties.

Voters are not required to declare their affiliation with a political party as a condition of voting in the general and non-partisan elections even if they are in fact affiliated with a political party. (Elec. Code § 501) A party whose members do not register with state election agencies as being affiliated with it does not qualify to have its nominating elections conducted for it by the state unless the party petitions the Secretary of State and makes a special showing of support among the electorate. (Elec. Code § 6430, subds. (b) and (c))

When a party chooses to become ballot-qualified it and its adherents lose their ability to determine who may be affiliated with them. In exchange for the state conducting the nominating elections for a political party, the state requires that all voters who choose to officially affiliate with the party be eligible to vote in the party's primary election (Elec. Code § 10200.5) and, with a demonstration of support from other such members of the party, become a candidate for the party's nomination in the primary election. (Elec. Code §§ 6495 & 6501).

Thus, a party which chooses to become ballot-qualified agrees to become a potential "umbrella" party and can fairly be said to aspire to that status by virtue of its choice to become ballot-qualified. An "umbrella" party seeks out and incorporates diverse and competing interests within its membership. California uses its electoral system to promote the existence of "umbrella" parties in furtherance of its interest in the stability of its political system because such parties are an effective device for mitigating "unrestrained factionalism [which] may do significant damage to the fabric of government" (*Storer v. Brown*, 415 U.S. 724, 736 (1974)).

The manner in which "umbrella" parties perform this function has been described in terms of the national Democratic and Republican parties (A. Ranney, *Curing the Mischiefs of Faction* 201 (1975)):

> "[E]ach party has sought winning coalitions by attempting accommodations among competing interests it hopes will appeal to more contributors and voters than will the rival accommodations offered by the opposition party. This strategy, it is conceded has resulted in vague, ambiguous, and overlapping party programs and in elections that offer the voters choices between personalities and, at most, general programmatic tendencies, certainly not unequivocal choices between sharply different programs. But this . . . is not a vice but a virtue, for it has enabled Americans through all but one era of their history to manage their differences with relatively little violence and to preserve the world's oldest democratic regime."

As Ranney's analysis indicates parties which aspire to "umbrella" status will be inclined to conduct their activities in a manner which contributes to the state's interest in stable government. Such parties will tend to have a coincidence of interest with the state and will therefore willingly and knowingly seek access to the primary election ballot for the very reasons that the state offers that opportunity. (See, Scott and Carr, "Political Parties Before the Bar: The Controversy Over Associational Rights", 5 Univ. of Puget Sound L. Rev. 267, 276-279 (1982).)

In opting to participate in the primary election as it exists in California, a party knowingly and willingly surrenders its perogative to determine its own membership and in effect chooses to permit its identity to be determined democratically by vote of all persons who simply officially associate with it (Elec. Code § 501) for whatever reason (Scott and Carr, *supra*, at 278):

> "Thus, the primary election provides insight into the policy objectives of the party as a whole. Party candidates for elective office are presumed to represent the wishes of the majority of the party on a wide range of political issues. These candidates, in other words, are not just candidates for elective office in the general election; from the standpoint of intraparty politics, they represent the party position on issues that concern party identifiers."

In effecting this result, the primary election system not only promotes the state's interest in the stability of its governmental system but the related and, as this Court has recognized (*American Party of Texas v. White*, 415 U.S. 767, 781, ftn. 15 (1974)), separate interest in the "democratic management of the political party's internal affairs".

These interests of the state and the self-interest of political parties which aspire to the status of an "umbrella" party coalesce and coincide in California's closed primary system and its implementing statutes which affect the ballot-qualified political parties. These statutes manifest the symbiotic relationship between ballot-qualified political parties and the state. As this Court noted in *Anderson v. Celebrezze*, 460 U.S. 780, ftn. 30 at 803 (1983), " . . . the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in state legislatures . . . ".

The evolution of the statutory ban on endorsements by central committees of ballot-qualified parties of candidates for their parties' nominations in the primary election (Elec. Code § 11702) illustrates the coincidence of in-

terest and symbiotic relationship between the state and ballot-qualified parties.

Prior to the adoption of a primary election system in California around the turn of the century, the major political parties prohibited their central committees from endorsing candidates for their parties' nominations at their conventions. (II App. 142-3) The reason for this prohibition was that the committees organized and put on the party nominating conventions so that official endorsements by the committees would impair the legitimacy and credibility of the conventions and the candidates chosen thereby in the eyes of backers of losing candidates with obvious negative effects on the party's prospects in the general election. (II App. 146-7)

After the advent of the primary election system, the central committees existed primarily to carry on their *parties'* campaigns for their candidates chosen at the primary election. (II App. 145-6) This role of the central committees was valuable to the parties because it provided a vehicle for securing resources for the election of the nominees available from candidates who were defeated in the primaries and their backers which might not otherwise be available directly to the nominees themselves. (II App. 107-8) The prohibition on endorsements of candidates by central committees continued to be the practice of the California Republican and Democratic parties because such activity could impair or preclude the effectiveness of the central committees in their role as catalysts of party cohesiveness for the general election. (II App. 107-10)

Eventually the existence of party central committees was established in statutes which recognized that virtually their only function was to conduct their parties' campaigns for their nominees in the general election. (II App. 144) The prohibition on endorsements continued as a matter of the policy and practice of the parties and was viewed by state officials and party organizations as being consistent with the primary election system and the best interests of the parties. (II App. 107-10)

The policy of the ban on endorsements by central committees was not expressly adopted by statute until 1963 when it was enacted as part (§ 11702) of the Truth in Endorsements Law. (Elec. Code § 11700 et seq.) This statute prohibits publications appearing to endorse candidates for the nomination of a ballot-qualified party in primary elections that utilize identifying words contained in the name of the party unless a prescribed statement that the "endorsement hereon is by an unofficial political group" appears on or in the endorsement publication. (Elec. Code §§ 11703-5, 11708-9)

The statute was enacted to combat a widespread practice of particular organized factions within the ballot-qualified parties of publishing slates of endorsements which misled voters into believing the endorsements had been made by official party organizations. (Elec. Code § 11701(3)) This practice is considered a fraud because in California the primary election is the means the ballot-qualified parties have chosen to "endorse" their candidates and pursuant to that choice central committees of such parties had never endorsed candidates for their

parties' nominations. (See, *People v. Crutcher*, 262 Cal. App.2d 750, 752-753; 68 Cal.Rptr. 904 (1968).)

The California Democratic and Republican parties had witnessed the evolution of unofficial associations of party members, such as the California Democratic Council (CDC) and the California Republican Assembly (CRA), for the purpose of endorsements in the primary elections, their identification with well organized ideological factions within the parties and the detrimental effect that identification had on the fate of the parties' nominees in the general election. (See, *Dancing Bear: An Inside Look At California Politics*, by Gladwin Hill, (World Publishing Co. 1968) pp. 160-161, 211-212, 217-218, 248, 252, 254-255.)

The introduction of such a dynamic into the central committees was and is clearly perceived by the parties as inconsistent with and destructive of the role of the central committees and of the parties (*Dancing Bear*, *supra*, at pp. 160-1):

> "As the purported voice of party rank-and-file, serving as a power base for office-seekers and office-holders, the CDC claimed the right to a major role in formulating party policy. This pretension quickly became a bugbear, both to the party's 'legal' hierarchy, concerned with unifying a membership that extended far beyond the 50,000 CDC activists, and to the office-holders. For an office-holder, CDC pronouncements tended to commit him to controversial positions and reduce his most valuable asset as a politician—the flexibility to maneuver."

Appellants believe that the Democratic and Republican parties manifested in both the official organizations and in the Legislature caused the Truth in Endorsements Law,

including the ban on endorsements by central committees, to be enacted to enable the parties to enforce their own policies as to proper methods of determining their identities.[2] Such policies probably could not be enforced by the party and its members in state court in the absence of the statutes. (Cf. *Malone v. Superior Court*, 40 Cal.2d 546, 551-552; 254 P.2d 517, 520 (1953).)

Elec. Code § 11702 has the effect of limiting all members of a ballot-qualified political party to one *official* nominating act—their vote in the primary election. In causing enactment into statute of this restriction, the parties invoked the state's interest "'of confining each voter to a single nominating act'" (*Tashjian*, *supra*, 107 S.Ct. 544, fnt. 13 at 554). As a result of this restriction, the vote of each party member has equal influence in the choice of the party's candidates and the policy determinations reflected therein. Moreover, the equality of influ-

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2. Defendants submitted a declaration pursuant to Federal Rules of Civil Procedure, Rule 56(f) regarding the need for discovery to respond to plaintiffs' voluminous motion for summary judgment concerning the issues of substantial infringement and standing. (II App. 114-124) Defendants intended to conduct extensive discovery from the records of retired legislators and the state and county central committees to document the role played by the parties in enacting the Truth In Endorsements Law, including the ban on endorsements, and the current policy of the state central committees on the issue of pre-primary endorsements. (*Id.*) The District Court acknowledged that defendants could not conduct formal discovery in response to the motion within the accelerated motions schedule it had set in anticipation of the June, 1984 primary elections but failed to permit such discovery to proceed after hearing argument on summary judgment. (II App. 232-234) The Court of Appeal acknowledged that the preclusion of discovery was prejudicial in a partial remand to the District Court on May 25, 1984. (II App. 87) However, the remand order did not permit proceedings on these issues.

ence enhances the acceptability of the nominees within the party and party cohesiveness for the general election.

These effects coincide with the state's interests in the stability of its political system and in the democratic management of the internal affairs of ballot-qualified political parties (*American Party of Texas v. White*, *supra*, 415 U.S. at ftn. 15, p.783; see also, Scott and Carr, *supra*, at 279) which are inherent in its direct primary election system.

The parties have also caused the portions of the by-laws of their state central committees pertaining to the composition of those committees and the terms of their chairpersons to be enacted into law. (II App. 106) The existence of these statutes enables the party and its membership to enforce the by-laws in state court as noted *supra*, to settle credentials disputes. Utilization of a neutral arbiter of credentials disputes mitigates potential divisiveness within the state central committee which could interefere with its role in uniting the party for the general election.

The parties' interests in stability coincide with the interests of the state. The absence of power to enforce this mitigating capability in court reduces or eliminates this mutual benefit. The judgment of the Court of Appeals eliminates that power.

The statutes concerning the structure of the state central committees reflect the by-laws of those committees and are enacted as requested by a party represented in the Legislature without interference from the other party as a matter of comity and custom. (II App. 106) The statutes regarding the composition of the state central committees of the different parties vary significantly in

accordance with the by-laws of each committee although they follow a similar pattern. (II App. 149-231)

The provisions regarding the terms of the chairpersons of the state central committees have a similar feature which reflects the state central committees' accommodations in their by-laws to a perennially significant phenomenon in California politics (*Dancing Bear*, *supra*, at 23-24):

> "Only nine years after California embarked on statehood, the problems of holding it together as a state seemed insuperable. The legislature voted to separate its northern and southern portions into two states, and enactment was duly signed by Governor John B. Weller on April 19, 1859. Only Congress' preoccupation with the impending Civil War prevented the necessary Federal ratification. And to this day the essential existence of two Californias, northern and southern, is formally recognized in a number of state laws drawing explicit sectional distinctions."

Each of them alternates the occupancy of the chair between representatives of Northern and Southern California (Cal. Elec. Code §§ 8774, 9724 and 9816) in the interests of avoiding sectional identification of the party and unnecessary conflict within the committee which could impede its role of unifying the party. This interest of the parties coincides with the state's interest in promoting by statute the duty of the state central committees to carry out their parties' campaigns for their nominees in the general election[3] the imposition of this duty by statute is

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3. The state central committees are mandated by statute to "conduct campaigns for this party and in behalf of the candidates of the party" and this is virtually the sole duty mandated by statute to these committees (I App. 12). (Elec. Code

(Continued on following page)

not challenged in this litigation. (Cf. *Marchioro v. Chaney*, 442 U.S. 191, 196-197 (1979).)

Plaintiffs associated as the National, Northern and Southern California Committees for Party Renewal, purportedly including six Democratic county central committees and one Republican county central committee out of a total of 58 county committees for each party, filed the first amended complaint in this action on or about December 3, 1983. (II App. 243-284) Neither the Republican nor Democratic state central committees or officers thereof are parties to this litigation.

At the time the litigation was filed and during its course through the completion of proceedings in the Ninth Circuit, none of the statutes invalidated as a result of the judgment of the Court of Appeals conflicted with the by-laws of the California Democratic, Republican and Libertarian state central committees. (I App. 18) Notwithstanding the efforts of the Committee for Party Renewal for two years prior to the filing of the complaint, its members were apparently unsuccessful in persuading the Republican and Democratic state central committees that the statutes invalidated in this litigation were not in the best interests of their parties.

When stay of the mandate of the Court of Appeals was denied by that body and by Justice O'Connor official

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(Continued from previous page)

§§ 8776 (Democratic Party); 9276 (Republican Party); 9688 (American Independent Party); 9819 (Peace and Freedom Party). Elec. Code §§ 8940, 9440, 9740 and 9850 mandate county central committees in similar language:

"A committee shall have charge of the party campaign under general direction of the state central committee or of the executive committee selected by the state central committee."

action was taken within both the Republican and Democratic state central committees to attempt to restore protection of the parties lost by the invalidation of Elections Code § 11702.

The rules committee of the Republican state central committee is considering submission to the full committee of proposed additions to the by-laws to prohibit pre-primary endorsements by any party central committee. (I App. 70-74)

The executive board of the Democratic state central committee has adopted additions to the by-laws which virtually prohibit pre-primary endorsements by party county central committees. (I App. 75-86)

Members of county central committees are elected by members of their party at primary elections conducted by the state. (See e.g., Elec. Code § 8870 et seq.) Their election obligates them to carry out the function and purpose of the committee which is, under the general direction of the state central committee, to conduct their party's campaign for its nominees for partisan office selected at the primary election.[4] (Cal. Elec. Code §§ 8940, 9440, and 9850.)

The derivative obligation not to endorse, support, or oppose candidates is the traditional limitation on the authority of central committees in California party politics that is enforceable by party members through the existence of Elec. Code section 11702. County central committee mem-

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4. Although members of central committees are elected at the June primary election, they typically do not assume their duties until January of the following year so that the committee in existence at the primary conducts the party's campaign at the November general election. (Cal. Elec. Code, §§ 8920 [Democratic]; 9420 [Republican].)

bers are elected knowing and on the condition that as a committee they will not endorse, support, or oppose candidates for their party's nomination in the primary election. Party members elect county central committees with reservation to themselves at the primary election of the prerogative of identifying the party's nominees.

Neither state central committee has adopted any amendments to its by-laws changing its composition or the terms of its chairpersons to the best of appellants' knowledge.

Notwithstanding the appellants' presentation of the information reiterated herein insofar as it existed prior to its judgment, the Ninth Circuit affirmed the summary judgment entered by the District Court invalidating these statutes.

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FEDERAL QUESTIONS ARE SUBSTANTIAL

This Court vacated the judgment of the Ninth Circuit invalidating these statutes and remanded for further consideration in light of its decision in *Tashjian*, *supra*, 479 U.S. —, 107 S.Ct. 544 (1986).

In *Tashjian* this Court held that a Connecticut statute which precluded independent voters from participating in the primary elections to determine the nominees of the political parties for certain offices was invalid as applied to the Connecticut Republican Party.

Application of the statute to the Republican party was invalid because it conflicted wtih a rule adopted by the party in convention permitting the participation of independent voters in primary election of party nominees for certain offices.

The governmental interests cited by the state for the Democratically controlled state legislature's refusal to enact an exception to the statute introduced by Republican members to allow implementation of the rule were held insufficient to justify the resulting substantial burden it placed on the right of the party and its members protected by the First Amendment to choose with whom they will associate in their quest for political success.

Nothing in the holding of *Tashjian* establishes that the statutes invalidated in this case constitute an impermissable burden on the First Amendment rights of the plaintiffs in this litigation or of the California Republican, Democratic and Libertarian parties.

None of the invalidated statutes conflicted with the rules of the state central committees of the three political parties affected by this litigation while it was pending in the courts below. Moreover, on the record in this case the parties can fairly be said to have chosen the policies reflected in the invalidated statutes as their own in pursuit of their own interests.

The interests set forth in justification of the invalidated statutes are different from the interests cited by Connecticut in defense of its statutes in *Tashjian* and have been recognized as compelling by this Court. The interests in the stability of its governmental system and the democratic management of the internal affairs of its ballot-qualified parties, relied upon by California in this case, were not cited by Connecticut in support of its statutes.

California's primary election system permits any elector who has registered with election officials as being affiliated with a ballot-qualified political party to vote the

ballot of that party in the primary election. The party cannot disaffiliate or prevent any such elector from participating in the selection of the party's nominees which is accomplished exclusively in the primary election. The state's right to impose this restriction on its ballot-qualified political parties is not challenged in this litigation.

Through this primary election system California promotes the development of "umbrella" parties which become an instrument of its interest in a stable governmental system. This Court has characterized this interest as compelling in the context of First Amendment analysis of political rights. (*Storer v. Brown, supra*, 415 U.S. at 736) Moreover, this primary election system promotes the state's strong and legitimate interest in establishing democratic management of the internal affairs of ballot-qualified political parties (*American Party of Texas v. White, supra*, 415 U.S. at ftn. 15, p.783).

The invalidated statutes apply only to ballot-qualified parties and exist to promote the compelling interests which underly the state's primary election system. Ballot-qualified parties have essentially chosen that status and the state regulations associated with it as being in their best interests.

California permits political parties to avoid that status and the associated regulation but still qualify its candidates for the general election ballot through independent candidacies (Elec. Code § 6400 et seq.) or write-in procedures. (Elec. Code §§ 17100-1). There is no requirement in the U.S. Constitution that a state elect its governmental officials through methods other than these.

When a state chooses to conduct nominating elections for political parties and provide automatic access to and identification on the general election ballot for candidates of the parties, it may establish conditions to this privilege so long as the conditions do not invidiously discriminate among the political parties. (*American Party of Texas v. White, supra*, 415 U.S. at 780-1) Since the invalidated statutes operate in the same manner with respect to any party which chooses to become ballot-qualified, such a consideration would not be present in this case.

It is the choice of the party whether its interests are best served through participation in the state's primary election system with its associated regulation of ballot-qualified parties or through use the of the other methods available to qualify its candiates for the ballot which keep it free of state regulation.

The parties affected by this litigation have opted for the state regulated system. With the possible exception of the state Libertarian party, which has it within its power to opt out of the state regulated system, none of them is a party to this litigation.

Through the intervention of the lower courts in this case, political rights and opportunities provided to rank and file members of ballot-qualified parties by the invalidated statutes have been peremptorily removed without their participation or the participation of those with a clear and legitimate claim to represent them.

The practicalities of political life in California are such that if the membership of the parties, especially the Democratic and Republican parties, want the changes advocated by plaintiffs, the challenged statutes will be in

all likelihood amended or repealed accordingly (*Dancing Bear, supra*, p. 263):

> " . . . as of 1967, party fragmentation made a revival of 'volunteer' movements problematical for the immediate future. Party leaders spoke of trying to develop rank and file organization [for purposes, *inter alia*, of making pre-primary endosements] under the wing of official party structures. But to do that called for a change in the laws, which couldn't be brought about very well until a lot of rank and file opinion was already mobilized." (Bracketed comments added)

By precluding the political parties from effectively expressing their views before invalidating these statutes, the lower courts have ignored this court's admonition reiterated in *Tashjian, supra*, 107 S.Ct. at 554:

> "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."

Thus, none of the indicia of an impermissable burden on the First Amendment rights of political parties and their members explicated in *Tashjian* is present in this case. California's long standing and successful regulation of its ballot-qualified political parties should not be jeopordized through First Amendment analysis which goes beyond *Tashjian* without plenary review by this Court.

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CONCLUSION

For the reasons presented above probable jurisdiction should be noted and the Court should set the matter for plenary consideration.

DATED: January 27, 1988

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

N. EUGENE HILL
Assistant Attorney General

GEOFFREY L. GRAYBILL*
Deputy Attorney General
Counsel for Appellants

* Counsel of Record

TABLE OF CONTENTS
TO VOLUME I OF THE APPENDIX

	Page
Order and Amended Opinion	1a
Notice of Appeal to the Supreme Court of the United States	53a
Amended Notice of Appeal to the Supreme Court of the United States	57a
Order on Motion for Stay of Mandate	61a
Table of Code Provisions	63a
Declaration of Charles H. Bell, Jr. with Exhibit (Recommended Endorsements Policy for the California Republican Party)	70a
Declaration of Brigitte Teri Burns with Exhibit (By-law Amendments of Democratic State Central Committee—Endorsement of Candidates for Partisan Office)	75a

FOR PUBLICATION

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Plaintiffs-Appellees,

v.

MARCH FONG EU, Secretary of the State of California, JOHN VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County, et al.,

Defendants-Appellants.

No. 84-1851
D.C. No.
C-83-5599-MHP
ORDER AND
AMENDED
OPINION

On Remand from the United States Supreme Court

Filed August 18, 1987
Amended October 29, 1987

Before: Eugene A. Wright, Otto R. Skopil, Jr. and William A. Norris, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Constitutional Law/Elections

On remand from the Supreme Court. District court grants of summary judgment affirmed.

This action arises from a challenge of sections of the California Elections Code (Code) which deal with state and county central committees of ballot-qualified political parties. Appellees, various groups active in California partisan politics and various members of party central committees, filed suit for injunctive and declaratory relief seeking to vindicate their first amendment rights. The district court ruled, inter alia, that the Code's ban on pre-primary endorsements by state and county central committees and its prescribing the membership of state central committees and the term of their chairs, violated the first amendment. This court's decision affirming the district court's rulings was vacated by the Supreme Court. The Court then remanded the case to this court for further consideration in light of a recent Supreme Court decision.

[1] The threshold arguments raised by the state are unpersuasive. [2] The Supreme Court has found justiciability notwithstanding a record of non-enforcement because the record did not show that the statutes had been commonly and notoriously violated. [3] Standing cannot be

defeated because no state central committee currently has by laws that conflict with the challenged statutes. [4] The Supreme Court has nowhere suggested that the adoption of a conflicting bylaw was necessary to confer standing or to show infringement of a first amendment right. [5] The eleventh amendment does not bar an action seeking prospective relief from enforcement of an unconstitutional statute. [6] The state does not advance an interpretation of the Code that would moot the constitutional questions raised by appellees. [7] Finally, even if the Code expressly characterized the committees as public agencies, this court rejects the premise that a state can strip a voluntary political association of first amendment rights by legislating it into an arm of the state.

[8] It is the right of the party, not the state, to decide how the party should be governed. [9] When the state restricts a party's freedom to choose its leadership, the state burdens the party's first amendment rights. [10] The Code intrudes directly on internal party affairs by dictating who can serve on the various state central committees. [11] Underlying the state's position seems to be a paternalistic assumption that, left to their own devices, parties will act in a manner adverse to their own interests. [12] Moreover, any state regulation of political parties beyond that necessary to further orderly elections must be viewed with great skepticism. [13] In short, a state's interest is in orderly elections, not orderly parties, and it may regulate political parties only as an incident to regulating elections. [14] Therefore, no compelling state interest is served by the Code's provisions regulating the membership of party committees and limiting the terms of committee chairs. [15] Moreover, the state has failed to

carry its burden of showing a substantially relevant correlation between the governmental interest asserted and the Code's provisions.

[16] Similarly, the state has no legitimate interest in protecting parties from the disruption that the state argues will result if parties are free to make preprimary endorsements. [17] The state has made no showing that banning preprimary endorsements sufficiently advances the interests in party cohesion to justify an outright prohibition on political speech. [18] Prohibiting the governing body of a political party from supporting or opposing candidates patently infringes both the right of the party to freely express itself and the right of party members to an unrestricted flow of political information. [19] The state's argument that preprimary endorsements confuse and unduly influence voters rests upon a lack of trust in the ability of voters to think and act for themselves.

COUNSEL

Geoffrey L. Graybill, Sacramento, California, for the defendants-appellants.

James J. Brosnahan, Cedric C. Chao, Paul R. Dieseth, Paul Flum, Morrison & Foerster, San Francisco, California, for the plaintiffs-appellees.

ORDER

The Court's opinion, filed on August 18, 1987, is hereby amended as follows:

The following footnote is added at the end of the first sentence on page 16 of the slip opinion:

> On appeal, the state has also raised the question whether the various appellee central committees have actually authorized participaton in this litigation. The district court ruled that the state waived the issue of capacity to sue by failing to comply with Rule 9(a), Fed. R. Civ. P., and by failing to raise the question on summary judgment. Order Following Remand, June 1, 1984. The district court also ruled that the state had failed to challenge declarations establishing authorization to bring suit. *Id. See, e.g.*, Declaration of Mary Gingell, member of the Executive Committee of the State Central Committee of the Libertarian Party of California. VII Appendix to Appellants' Emergency Motion for Stay on appeal, at 934. We see no reason to disturb these rulings on appeal.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Wright expresses no opinion on the suggestion for rehearing en banc, Judge Skopil recommends that it be rejected, and Judge Norris votes for rejection of the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

OPINION

NORRIS, Circuit Judge:

This case involves a First Amendment challenge to various sections of the California Elections Code. The challenged sections specify the membership of the state central committees of ballot-qualified political parties and the term of office of committee chairs, and prohibit both state and county central committees from endorsing candidates in party primaries.

Plaintiffs are various county central committees of the Democratic and Republican parties, the state central committee of the Libertarian party, members of these and other party central committees, and various other groups and individuals active in partisan politics in California. They sued the Secretary of State and Attorney General of California and the district attorneys of various counties (hereinafter "the State") for declaratory and injunctive relief under 42 U.S.C. § 1983 seeking to vindicate their asserted First Amendment right to endorse candidates running in California's direct primary elections and to structure and conduct the internal affairs of their respective political parties free of unjustified interference by the state.[1]

In the first count of their first amended complaint, plaintiffs challenge the constitutionality of Cal. Elec. Code § 11702, which prohibits state and county central committees from endorsing, supporting, or opposing candidates for partisan office in direct primary elections. Plaintiffs' second count challenges sections of the Elections Code and the state constitution that prohibit central committees from endorsing candidates in nonpartisan county, city and school elections. Plaintiffs' third count challenges Code sections that prescribe the membership of state central committees, the term of office of state committee chairpersons, the time and place of state and county central committee meetings, and the dues to be paid by county committee members.

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[1]The First Amendment is made applicable to the states through the Fourteenth Amendment. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Schneider v. State*, 308 U.S. 147, 160 (1939).

Plaintiffs moved for summary judgment on all three counts. In response, the State moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(1) and (6) and cross-moved for summary judgment. The district court granted summary judgment on plaintiffs' first count, ruling that section 11702's ban on preprimary endorsements violated the First Amendment. The court stayed all proceedings on plaintiffs' second count under the abstention doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The court granted partial summary judgment on plaintiffs' third count, ruling that the sections prescribing the membership of state central committees and the term of their chairs violated the First Amendment.[2] The court, however, denied plaintiffs' motion for summary judgment with respect to those Code sections regulating the time and place of committee meetings and county committee dues. The court also denied in all respects the State's motion to dismiss and cross-motion for summary judgment. Although the district court did not finally dispose of all issues with respect to all parties, it directed the entry of final judgment for plaintiffs under Fed. R. Civ. P. 54(b) on the first count and as to those claims in the third count decided in plaintiffs' favor. Ac-

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[2]The district court invalidated the following sections: Cal. Elec. Code §§ 8660, 8661, 8663—67, 8669 (Democratic State Central Committee); §§ 9160, 9160.5, 9161, 9161.5, 9162—64 (Republican State Central Committee) (West Supp. 1984); 9274 (Republican State Central Committee Chairman); and § 9816 (Peace & Freedom State Central Committee Chairperson) (West 1977).

cordingly, we have appellate jurisdiction under 28 U.S.C. § 1291 (1982).[3]

In *San Francisco County Democratic Central Committee v. Eu*, 792 F.2d 802, 820 (9th Cir. 1986), we affirmed the district court's judgment granting summary judgment to plaintiffs. Our judgment was, however, vacated by the United States Supreme Court, which remanded the case to this court "for further consideration in light of *Tashjian v. Republican Party of Connecticut*, 479 U.S. —, 107 S. Ct. 544, 93 L.Ed.2d—(1986)." *Eu v. San Francisco County Democratic Committee*, 107 S. Ct. 864 (1987). Having considered the matter further after supplemental briefing by the parties, we conclude that *Tashjian* supports our previous decision and accordingly reinstate our judgment affirming the district court for the reasons set forth in this modified opinion.

I

Plaintiffs contend that California's political parties and their governing bodies—the state and county central committees—are voluntary associations entitled to the full protection of the First Amendment. They argue that California's prohibition of preprimary endorsements and the state's regulation of party structure and internal affairs abridge their freedom of political expression and association.[4] In response, the State argues that the state and county central committees of ballot-qualified political parties in California do not enjoy First Amendment status because they are public entities, not private associations. In the alternative, the State argues that the challenge provisions of the Election Code pass First Amendment muster because they are narrowly drawn statutes that serve compelling state interests.

[3]We review a summary judgment *de novo*. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). Summary judgment is appropriate if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(b). We also review *de novo* the district court's denial of the State's motion to dismiss under Fed. R. Civ. P. 12(b)(1) & (6) for want of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. *See, e.g., Trerice v. Pedersen*, 769 F.2d 1398, 1400 (9th Cir. 1985).

"Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Because "[e]xercise of these basic freedoms . . . has traditionally been through the media of political associations," *id.*, political parties as well as individual party adherents enjoy First Amendment rights. *See Tashjian v. Republican Party of Connecticut*, 107 S. Ct. 544, 548-49 (1986); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975).[5] Moreover, " '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' " *Tashjian*, 107 S. Ct. at 549 (quoting *Sweezy*, 354 U.S. at 250).

[4]Plaintiffs also claim that the State's regulation of ballot-qualified parties violates their rights to equal protection of the laws under the Fourteenth Amendment. It is unnecessary to reach this claim.

[5]*See also* Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S.Cal.L.Rev. 213, 265 (1984) [hereinafter Weisburd, *Candidate-Making and the Constitution*] ("parties as parties have associational rights").

Thus, courts have "placed the internal workings of a political party squarely within the protection of the First Amendment." *Ripon Society Inc. v. National Republican Party*, 525 F.2d 567, 586 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

In this case we must apply these settled First Amendment principles to the restrictions imposed on California political parties by various provisions of the California Elections Code. To place the important constitutional questions presented by this appeal into perspective, we will first provide an overview of state regulation of political parties in California.

Like our national political parties,[6] California's political parties were originally unregulated voluntary associations of individuals "governed largely by custom and usage." *Unger v. Superior Court*, 37 Cal.3d 612, 615, 692 P.2d 238, 209 Cal. Rptr. 474 (1984) (*Unger II*); *see also* 59 Ops. Cal. Atty. Gen. 60 (1976); 23 Ops. Cal. Atty. Gen. 119, 120 (1954) (citing *Spelling v. Brown*, 122 Cal. 277, 279, 55 P. 126 (1898)). These voluntary associations "fix[ed] membership criteria, nominat[ed] candidates for public office, conduct[ed] their campaigns, and shap[ed] their platforms" with neither recognition nor interference from the state. Friedman, *Reflections Upon the Law of Political Parties*, 44 Cal. L. Rev. 65, 66 (1956); *see also*

[6]See, e.g., *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972) (per curiam) ("our national political parties first came into being as voluntary associations of individuals"); see also A. De Tocqueville, 2 *Democracy in America* 129 (Bradley, ed. 1954); D. Broder, *The Party's Over: The Failure of Politics in America* 172 (1971).

Spier v. Baker, 120 Cal. 370, 380, 52 P. 659 (1898). Internal party decisions were generally made at party conventions where choices as important as "who shall represent [the] party on the election day ballot [were] left exclusively to a select group of its leaders." J. Owens, E. Costantini & L. Weschler, *California Politics and Parties* 78 (1970) [hereinafter, "*California Politics*"]. At the turn of the century, Progressive Republicans, led by Hiram Johnson, set out to replace the prevailing laissez-faire regime with one ostensibly designed to democratize and purify the parties by rescuing them from the stranglehold of wealthy special interests.[7] *See Assembly Interim Committee on Elections and Reapportionment*, Report on Political Party Organization 7, *reprinted in* 1 Appendix to Journal of the Assembly (1963).

Spurred on by the Progressive reformers, the state legislature took the first—and most fundamental—step toward democratizing political parties by enacting a direct primary law, which transferred the power to nominate candidates from party organizations to the voters themselves. *See Hart v. Jordan*, 168 Cal. 321, 143 P. 537 (1914); *Katz v. Fitzgerald*, 152 Cal. 433, 93 P. 112 (1907); *see also California Politics*, *supra* at 35. As part of the same reform movement (*see* Opinion, Legislative Counsel of California, February 23, 1978. Excerpt of Record 465), the California legislature required political parties to form

[7]The most notorious special interest and the chief impetus to reform was the Southern Pacific Railroad Company, nicknamed "the Octopus" because of its allegedly ubiquitous corrupting influence on state government. *California Politics*, *supra* at 32. According to one commentator, the Southern Pacific "literally ran the state's politics." *Id.* at 31.

state and county central committees and adopted rules for party governance.[8]

The Elections Code provisions regulating party governance are byzantine in their complexity[9] and vary in extent and detail from party to party. *See, e.g.*, Cal. Elec. Code §§ 8500—8945 (Democratic Party), 9000—9510 (Republican Party), 9600—9745 (American Independent Party), 9750—9855 (Peace and Freedom Party). To take the Democratic Party as an illustration, the Code establishes party central committees at the county, *id.* § 8820, and state-wide levels, *id.* § 8660; it dictates the size, membership, and apportionment of these committees, *id.* §§ 8660—8672 (state committee), 8820—8834 (county committees); it mandates the place and time of [illegible], *id.* §§ 8710—8711, 8920—8922; it enjoins [illegible]al committee to observe standard parliamentary procedure, *id.* § 8778; and it provides for the election of a state chair and vice-chair and requires that they be selected alternately from the northern and southern sections of the state. *Id.* § 8774.

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[8]The political reforms that the Progressives wrote into California law during the first two decades of this century parallel laws adopted in other states. Between 1890 and 1920, most states adopted "elaborate legal codes closely regulating the state parties' internal affairs: the codes generally stipulated what committees and conventions the parties must have, the procedures by which their members are selected, who may participate in making the parties' decisions, and what powers, if any, each party organ has over the others." A. Ranney, *Curing the Mischief of Faction: Party Reform in America* 18 (1975). For a thorough catalogue of the reform measures implemented in the other states, see J. Starr, *The Legal Status of American Political Parties I*, 34 Amer. Pol Sci. Rev. 439 (1940).

[9]See Friedman, *supra* at 71 (describing the laws governing the parties as "an illogical, disordered pattern").

Most importantly, the Elections Code assigns to each party's state central committee the "statutory function of party leadership" by placing it "at the very helm of the party's general election campaign." 23 Ops Cal. Atty. Gen. 119, 123 (1954); *see* Cal. Elec. Code §§ 8776,8940.[10] Similarly, the Code provides that the county committees "shall have charge of the party campaign under general direction of the state central committee." *Id.* §§ 8940 (Democratic Party), 9440 (Republican Party), 9740 (American Independent Party), 9850 (Peace and Freedom Party). Hence, at least in theory, the central committees constitute the governing bodies of the parties.

In practice, commentators have noted that the statutory organization of the central committees is so cumbersome as to make only titular leadership realistically possible.[11] *See California Politics*, *supra* at 190-91. For example, the Democratic state central committee is composed of over 1,000 members—more than five times the size of the State Convention. *Id.* at 191. The member-

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[10]See Friedman, *supra* at 69 ("[i]n statutory contemplation California party organs have been left with one major role—to campaign for the general election success of the party nominees selected by the voters at the primary"); *see also* 23 Ops. Cal. Atty. Gen. 119, 121-23 (1954).

[11]The separate Elections Code provisions prescribing the membership of the Republican, American Independent, and Peace and Freedom central committees differ in some respects from the Democratic Party provisions. See, e.g., Cal. Elec. Code §§ 9000—9510 (Republican Party). For instance, Elections Code §8774 requires that the chairperson of the Democratic Party state central committee serve a single term to be fixed by party by-laws and that the chair alternate between residents of northern and southern California. Section 9274 duplicates the north-south rotation requirement of section 8774 but specifies a fixed term of two years for the Republican Party chair.

ship includes all Democratic officeholders from Governor to members of the Congress and the state legislature. Cal. Elec. Code § 8660(a). Each state-wide officeholder,[12] United States Senator and state senator appoints three other state committee members, "at least two of whom shall be of the opposite sex"; and each member of Congress and the State Assembly appoints two other members, "at least one of whom shall be of the opposite sex." *Id.* § 8663. Defeated party nominees for these offices also serve on the committee and appoint their share of additional members. *Id.* § 8661. Rounding out the membership are members elected by the county committees on a basis proportionate to registered party strength in each county, *id.* §§ 8660(b), 8667; five members elected by a caucus convened in each assembly district, *id.* § 8660(g) & 8669; and miscellaneous others.[13]

Thus, the legislative design favors elected officials over party members who do not hold elective office. The design particularly favors incumbent state legislators, who enact and amend the legislation regulating party affairs. Members of the California State Assembly and Senate can control as many as 400 positions; in comparison, the

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[12]The state-wide officeholders are the Governor, the Lieutenant Governor, the Treasurer, the Controller, the Attorney General, the Secretary of State, and members of the State Board of Equalization. Cal. Elec. Code § 8660(a)(1)—(7).

[13]The miscellaneous state committee members include the following: (1) the national committeemen and national committeewomen of the party; (2) such immediate past party officers as are provided by party by-laws; (3) the President of the California Democratic Council and the President of the Federation of Young Democrats; and (4) former elected, nonjudicial officeholders. Cal. Elec. Code § 8660 *passim*.

California delegation to the United States Congress and Senate controls only 143 positions. *See* Cal. Elec. Code § 8660.

Finally, all party central committees have been prohibited from endorsing or opposing candidates in party primaries. Commentators have claimed that, like the cumbersome provisions dictating party governance, the ban on preprimary endorsements has weakened political parties, especially their ability to recruit and elect candidates who will further the party's goals.[14] *See* Friedman, *supra* at 70; *California Politics*, *supra* at 4; *see also* 23 Ops. Cal. Atty. Gen. 119, 122 (1954). Plaintiffs' uncontroverted affidavits show that by excluding the committees from the process of choosing party nominees "a basic function of a political party in [our system]." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973), the state has effectively drained party central committees of political power. Although the legislature has charged the committees with the responsibility of running the general election campaigns of party nominees, in reality nominees run their own campaigns through ad hoc campaign committees. Supplemental Declaration of Austin Ranney; *see also California Politics*, *supra* at 199-200. Indeed, the California Attorney Gen-

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[14]Partisan politics in California has been further inhibited by other provisions of the Elections Code. California has adopted non-partisan municipal elections, the initiative and referendum, and at one time allowed cross-filing, which permitted candidates with declared allegiance to one party to run simultaneously for the nomination of another party. Each of these Progressive-era innovations has curbed the ability of the party organization to shape the party's political agenda and support sympathetic candidates. *See California Politics* at 4 & 294-95; *cf.* Ranney, *Curing the Michief of Faction*, *supra* at 17-19.

eral has opined that the ban on preprimary endorsements reflects the Progressives' "intent to minimize the role of the established party agencies." 23 Ops. Cal. Atty. Gen. at 122. Overall, it has been observed that California's regulation of political parties has pushed them "out of much of their original domain." Friedman, *supra* at 69.

II

[1] At the outset, we consider various threshold issues raised by the State in its motion to dismiss below and renewed on appeal. The State presents four reasons for reversing the district court without reaching the merits: (1) plaintiffs' complaint fails to raise a justiciable controversy; (2) plaintiffs lack standing to bring the action; (3) the action is barred by the Eleventh Amendment; and (4) the district court should have abstained under the *Pullman* doctrine from adjudicating the first and third causes of action. We find none of these arguments persuasive.

A

Article III limits the exercise of federal judicial power to actual cases and controversies. *NAACP v. City of Richmond*, 743 F.2d 1346, 1350 (9th Cir. 1984). A plaintiff who challenges a statute must demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). But "[o]ne does not have to await the consummation of the threatened injury [to seek relief]. If the injury is certainly impending that is enough." *Babbitt*, 442 U.S. at 298 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). When a plaintiff seeks to engage in conduct proscribed by statute and a credible threat of prosecution exists, he need not "expose himself to actual arrest and prosecution to be entitled to challenge [the] statute . . . ." *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)); *see also Doe v. Bolton*, 410 U.S. 179, 188 (1973). This is especially true in a First Amendment case because of "the sensitive nature of constitutionally protected expression." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

Relying on *Poe v. Ullman*, 367 U.S. 497 (1961), the State claims that the action is not justiciable because the Elections Code provisions that plaintiffs challenge have never been enforced. In *Poe*, the Supreme Court held that a constitutional challenge to a Connecticut ban on contraceptives was not justiciable because the ban had never been enforced during its seventy-five year history, *id.* at 501, even though "contraceptives [were] commonly and notoriously sold in Connecticut drug stores." *Id.* at 502. This case, however, is distinguishable from *Poe* in that here we have no record that the relevant provisions have been "commonly and notoriously" violated. Indeed plaintiffs' uncontroverted affidavits show that they have consistently, if reluctantly, obeyed the statutes in conducting party affairs.

[2] Rather than *Poe*, we believe resolution of the justiciability issue is controlled by *Babbitt*, 442 U.S. at 302-03, and *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968). In both cases, the Court found justiciability notwithstanding a record of non-enforcement because, as dis-

tinguished from *Poe*, the record did not show that the statutes had been "commonly and notoriously" violated.[15]

The State further contends that, under *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), federal courts lack the authority to determine that a violation of a challenged state statute is a criminal offense unless the statute has already been enforced through a criminal prosecution.[16] The State asserts that because federal courts cannot "instruct[] state officials on how to conform their conduct to state law," *id.* at 106, they are necessarily disabled from finding that a state statute requires criminal prosecution. We cannot accept this reading of *Pennhurst*. There the Supreme Court merely held that federal courts had no jurisdiction over an action to compel state officials to adhere to state law. *Pennhurst* does not undermine either explicitly or implicity the settled

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[15]The State argues without authority that no case or controversy is raised by a challenge to an unenforced criminal statute unless that statute was recently enacted. This argument is refuted by *Epperson*, where the Court held the statute justiciable despite its unenforced presence on the books for forty years. *See* 393 U.S. at 109 (Black, J., concurring). Indeed, the aftermath of *Poe* teaches that federal courts should not lightly determine that a statute has fallen into desuetude. The very statute the Court characterized as a dead letter in *Poe* was struck down in *Griswold v. Connecticut*, 381 U.S. 479 (1965), after the state prosecuted two persons, including a doctor for openly counselinv married persons on the use of contraceptives. We note that the Supreme Court did not cite *Poe* in either *Babbitt* or *Epperson*.

[16]The State also asserts that criminal penalties are not associated with the violation of the challenged statutes. We agree with Judge Patel, however, that, in light of the plain statutory language of Cal. Elec. Code §§ 29102 & 29430, the apparent disavowal of any intention to enforce these laws is "anomalous." *San Francisco County Democratic Central Committee v. Eu*, No. C-83-5599, at 6 (Order filed May 3, 1984).

rule that when a plaintiff is "one against whom the[] criminal statutes directly operate . . . a sufficiently direct threat of personal detriment" is alleged. *Bolton*, 410 U.S. at 188.

B

Closely related to the case or controversy requirement is the requirement that plaintiffs have standing to bring the action.[17] *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). The State argues that plaintiffs lack standing because they have not shown that any party's state central committee has adopted bylaws that conflict with the statutory restrictions on preprimary endorsements and internal goverance. Thus, the State argues, plaintiffs would not obtain effective relief from a judicial declaration that the statutes were unconstitutional. Moreover, the State argues, plaintiffs fail to state a claim for the infringement of *their* First Amendment rights because the First Amendment rights at stake belong to the party state central committees and those committees have voluntarily complied with the statutes. These arguments fail on two scores: (1) they are based

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[17]On appeal, the state has also raised the question whether the various appellee central committees have actually authorized participation in this litigation. The district court ruled that the state waived the issue of capacity to sue by failing to comply with Rule 9(a), Fed. R. Civ. P., and by failing to raise the question on summary judgment. Order Following Remand, June 1, 1984. The district court also ruled that the state had failed to challenge declarations establishing authorization to bring suit. *Id. See, e.g.*, Declaration of Mary Gingell, member of the Executive Committee of the State Central Committee of the Libertarian Party of California. VII Appendix to Appellants' Emergency Motion for Stay on appeal, at 934. We see no reason to disturb these rulings on appeal.

on the erroneous premise that conformity with obligations imposed by law proves that those laws do not restrict constitutional freedoms; and (2) they erroneously assume that the only bodies capable of challenging the statutes are the party state central committees.

[3] The fact that no state central committee currently has bylaws that conflict with the challenged statutes hardly indicates that those statutes do not restrict the parties' First Amendment rights. Parties cannot qualify for the ballot unless they conform their operations to the statutory blueprint prescribed for one of the existing ballot-qualified parties. *See* Cal. Elec. Code § 9955. The State nonetheless argues that a party's decision to become ballot-qualified makes its conformance with those statutes voluntary and thus removes any constitutional difficulty. *See* Appellant's Supplemental Brief on Remand at 4. A state cannot, however, constitutionally condition a party's access to the ballot—the lifeblood of any party—upon that party's foregoing its First Amendment freedoms. The First Amendment bars the government from attaching unconstitutional conditions even to benefits the government has no obligation to bestow. *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983) ("the government may not deny a benefit to a person because he exercises a constitutional right"); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The bar applies even more forcefully when the government attempts to attach unconstitutional conditions to a party's right of access to the ballot.

[4] We also reject the State's suggestion that if political parties are reluctant to violate the statutes they must

obtain standing by adopting bylaws that conflict with the statutes and then disregarding those bylaws in actual practice. Institutions are not required to make the empty gesture of passing rules that are void as a matter of law and ignored as a matter of institutional practice in order to satisfy standing requirements. Certainly a failure to make such a futile gesture gives us no grounds for inferring that the parties' bylaws merely reflect a neat coincidence of what the parties want and what the statutes require. The State correctly points out that in *Tashjian* the Republican Party of the State of Connecticut had adopted a party rule that conflicted with state election law. *See* 107 S. Ct. at 546-47. But the Supreme Court nowhere suggested in *Tashjian* that the adoption of a conflicting bylaw was necessary to confer standing or to show infringement of a First Amendment right.

Finally, the State makes the rather astonishing argument that the legislative action in this case can be equated with voluntary action by the political parties. The State asserts that:

> when the nominees of a party who are actually elected to the Legislature enact legislation affecting the organization and procedures of the party institutions the legislation is an act of self-governance by the party itself. Appellants presented evidence in the district court to support their motion for summary judgment and to oppose appellee's (sic) motion demonstrating that by custom and practice the political parties represented in the legislature accept each other's party legislation. Obviously, the legislators, who are inherently their party, are also exercising the legislative power of the state.

Appellants' Supplemental Brief Pursuant to Court Order Dated August 5, 1985, at 3.

The State's argument collapses on its own terms. State legislators are not "inherently their party." Nor do legislative enactments that bind the parties and carry criminal penalties represent the parties' own voluntary action. The exercise of the coercive power of the state is the antithesis of voluntary action by political associations. Regardless of the motives of individual legislators or the quid pro quo arrangements that led to passage of of the challenged statutes, the result remains the same: state regulation of political parties. To hold otherwise would be to allow the state legislature to endow the committees with "the statutory function of party leadership," 23 Ops. Cal. Atty. Gen. 119, 123 (1954), and place that leadership in the effective control of state legislators, *see California Politics* at 191, without fear that their exercise of legislative power will be reviewed under the First Amendment.[18]

The State has simply failed to make any showing that the political parties have voluntarily adopted the statutory restrictions. Indeed, the uncontroverted affidavits of party

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[18]The State also relies on *Marchioro* v. *Chaney*, 442 U.S. 191 (1979). In *Marchioro*, the plaintiffs contended that the policymaking body of a political party enjoys an absolute First Amendment exemption from state regulation. The Supreme Court rejected the claim without reaching the First Amendment issue by pointing out that the state law did not require the central committee to perform any policymaking functions; those functions had been freely delegated to the central committee by the party itself. *Id* at 198 & n.13; *see also* Weisburd, *Candidate-Making and the Constitution*, *supra* at 270 n.336. In this case, by contrast, state law compels ballot-qualified parties to adopt the statutory restrictions.

representatives indicate the contrary: they would reform the composition of their parties' central committees if the statutes were invalidated. Moreover, all committee plaintiffs say they would make preprimary endorsements if the practice were not prohibited. The obvious fact that the State Central Committee of the Libertarian Party of California is a named plaintiff would seem to satisfy even the State's assertion that plaintiffs cannot state a cause of action unless they show that "the statutes conflict with the policies and will of" the state central committees. *See* Appellants' Supplemental Brief on Remand From the United States Supreme Court at 6-8.

Even if the State were correct in asserting that the state central committees have no standing to challenge the statutes until they adopt conflicting bylaws, the State has still failed to show that plaintiffs do not have standing to bring suit for the infringement of *their* First Amendment rights as party officials, county committees, and party members. Indeed, the State's argument that the only bodies capable of challenging the statutes prescribing the membership and terms of the state central committees are the state central committees themselves turns the associational interest at stake on its head. The associational rights of political parties and their members to choose their own governing body would be of little avail if a statute imposing a state-created and selected governing body could only be challenged by the governing body the state imposed. We thus reject the State's apparent assertion that political parties and their members must endure leadership chosen by the State until that leadership votes itself out. Nor do we accept the State's assertion that only the state central committees can challenge the statutes for-

bidding preprimary endorsements. The State never offers any satisfactory explanation as to why the county committees cannot challenge the statutes prohibiting preprimary endorsements as an infringement of *their* rights to speak freely. Nor has the State explained why the individual party members cannot challenge these statutes as an infringement of *their* First Amendment right to *listen*. *See e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.") *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (acknowledging "a First Amendment right to 'receive information and ideas,' and that freedom of speech '"necessarily protects the right to receive."'") (quoting *Kleindeist v. Mandel*, 408 U.S. 753, 762-63 (1972)).

C

[5] The State next argues that plaintiffs' action is barred by the Eleventh Amendment. It is settled law, however, that the Eleventh Amendment does not bar an action seeking prospective relief from enforcement of an unconstitutional statute. *Ex parte Young*, 209 U.S. 123 (1908). Because plaintiffs do not seek damages, but only declaratory and injunctive relief, *Ex parte Young* is directly controlling. *See also Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

D

Finally, relying on *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the State contends that

the district court should have abstained from adjudicating plaintiffs' first and third counts pending the resolution of litigation in state court raising similar challenges to the Elections Code. In *Pullman*, the Supreme Court held that abstention may be appropriate "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984). *Pullman* abstention is inappropriate, however, "when a state statute is not "fairly subject to an interpretation which will render unnecessary' adjudication of the federal constitutional question." *Id.* (citation omitted); *see also Canton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir. 1974).

[6] Here, the State does not advance an interpretation of the Elections Code that would moot the constitutional questions raised by plaintiffs. Nor could the State do so. Section 11702 is clear on its face that central committees may not make preprimary endorsements, and other provisions prescribe in minute detail committee membership and limit the terms of committee chairs. Thus the district court's refusal to invoke *Pullman* abstention was not an abuse of discretion.[9] *See C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983).

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[9]This court has a "virtually unflagging obligation" to exercise jurisdiction and may abstain only in exceptional circumstances. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). This unflagging "'obligation is particularly weighty when those seeking a hearing in federal court are asserting . . . their right to relief under 42 U.S.C. § 1983.'" *Miofsky v. Superior Court of California*, 703 F.2d 332, 338 (9th Cir. 1983 (quoting *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980)).

III

Before considering plaintiffs' claims that the Elections Code unjustifiably burdens their First Amendment rights, we address the State's contention that the state and county central committees of California's ballot-qualified political parties have no First Amendment rights because they are public entities, not private associations. The State asserts that the legislature transformed the committees from voluntary political associations into public entities "integral [to] the state's election system," Appellants' Supplemental Brief, p. 15, when it dictated the committees' organization and powers and charged them with the responsibility of conducting the general election campaigns of party nominees. *Id.*, p. 13.

[7] In essence, the State argues that by regulating the committees, the legislature may deprive them of First Amendment rights. The State's argument is flawed by "bootstrap reasoning." *Abrams v. Reno*, 452 F. Supp. 1166, 1170 (S.D.Fla. 1978) ("[w]ithout begging the question of the right of a political executive committee to exist and function without the breath of life provided by the election code, it seems to be bootstrap reasoning to suggest that election code regulation permits the denial of substantial constitutional rights"), *aff'd*, 649 F.2d 342 (5th Cir. 1981), *cert. denied*, 445 U.S. 1016 (1982). Even if the California Elections Code had expressly characterized the committees as public agencies,[39] we would reject the

[39]The status of these committees under the Elections Code is less clear than the State would have us believe. The State contends that under *Katz v. Fitzgerald*, 152 Cal. 433 (1907), "political parties shall be . . . regarded as public bodies whose

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State's premise that a state can strip a voluntary political association of First Amendment rights by legislating it into an arm of the state. In *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), for instance, the Supreme Court held that extensive regulation, however beneficial to the public, cannot deprive a utility of its status as a private entity entitled to constitutional rights. *Id.* at 533-34 & n.1. Likewise, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court repudiated the notion that the status of corporations as "creatures of the state" permits the state to prohibit corporate speech. *Id.* at 778 n.14. It follows a *fortiori* that the state cannot abridge the First Amendment rights of political associations by arguing that regulatory legislation

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methods are to be controlled by the state." *Id.* at 435. While a state's characterization of state political parties does not bind this court's determination of plaintiffs' First Amendment status, we note that the State's characterization of the committees as public entities is belied by the refusal of both the California Supreme Court and the California Attorney General to so characterize them. *See Unger II*, 37 Cal. 3d at 615 (committees "are not agencies of the state for all purposes"); 59 Ops. Cal. Atty. Gen. 60, 61 (1976) (committees "are not public agencies"); 23 Ops. Cal. Atty. Gen. 119, 120 (1954) (committees "are no more public agencies than were their counterparts in the pre-primary era"). Moreover, the contention that the committees are state agencies is somewhat incongruous because unlike the sovereign, party central committees are expected to serve party interests, not the interests of the public at large; specifically, they are charged by statute with the responsibility of running the general election campaigns of party nominees. *See, e.g.*, Cal. Elec. Code §§ 8776 & 8940.

makes them "creatures of the state."[21] *Cf. Tashjian*, 107 S.Ct. at 550 (state's power to regulate elections does not justify, without more, the abridgement of the associational rights of political parties and their members).

We recognize that California has extensively regulated political parties. The State, however, turns constitutional analysis upside down when it argues that its Elections Code provisions are immune from constitutional attack because they deprive the party committees of First Amendment status. The question is not whether the committees lack First Amendment rights because of state regulation. Rather, the question is whether the challenged statutory provisions must fall because they violate the committees' First Amendment rights. Turning to this question, we address in Part IV the constitutionality of the provisions that regulate the structure and internal affairs of the parties. In Part V, we consider the constitutionality of the ban on preprimary endorsements.

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[21]The so-called "white primary" cases are not to the contrary. While the State cites *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944), for the proposition that political parties are "public bodies" because they are part of the state's machinery for choosing officials, that case held only that a state party's disenfranchisement of black party members in its primary election amounted to state action for purposes of the Fifteenth Amendment. In later cases, the Court has limited *Smith* to its unusual context: a state-mandated racially discriminatory primary scheme in a one-party state where nomination is tantamount to election. In both *Cousins v. Wigoda*, 419 U.S. 477 (1975), and *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), the Court "appears to reject the argument that an activity is state action solely because it is integral to a state-created election process." Weisburd, *Candidate-Making and the Constitution*, *supra* at 239 (1984).

IV

Our analysis of plaintiffs' constitutional claims begins with the fundamental premise that "a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981). It, as plaintiffs allege, the state statutes interfere with their rights to free association and free expression, the statutes can survive First Amendment scrutiny only if the State shows that they are "necessary to serve a compelling interest." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *see also Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) ("even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty").[22]

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[22]The Supreme Court has developed the following detailed methodology for deciding whether laws that impinge on associational freedoms violate the First Amendment.

> [A] court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Tashjian, 107 S. Ct. at 548 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see also Socialist Workers Party v. Secretary of State*, 765 F.2d 1417, 1418 (9th Cir. 1985). We do not, however, construe *Tashjian* and *Anderson* as disturbing the settled rule that laws that restrict First Amendment freedoms

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We first consider whether the statutes' regulation of the selection of state committee members and the term of office of committee chairs burdens plaintiffs' First Amendment rights. We then consider whether this regulation serves compelling state interests. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

A

"[T]he right of individuals to associate for the advancement of political beliefs" is fundamental, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), and includes the "freedom to identify the people who constitute the association, and to limit the association to those people only," *Wisconsin ex rel. La Follette*, 450 U.S. at 122; *see also Tashjian*, 107 S. Ct. at 549. Because the right of association would be hollow without a corollary right of self-governance, "there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective." *Ripon Society Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C.Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). "The Party's determination . . . of the structure which best allows it to pursue its political goals is protected by the Constitution." *Tashjian*, 107 S. Ct. at 554; *see aso Ripon Society Inc.*, 525 F.2d at 585 ("a party's choice, as among various ways of governing itself, of

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must "be demonstrably supported by not only a legitimate state interest, but a compelling one." *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982). Indeed, in a later passage in *Tachjian* the Supreme Court makes clear that the inquiry is whether an election code that infringes first amendment rights "is a narrowly tailored regulation which advances the State's compelling interests." *Tashjian*, 107 S. Ct. at 550.

the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution. . . .") (emphasis in original).

[8] It is readily apparent that the California statutes burden the parties' right to govern themselves as they think best. By legislative fiat, the State vests party leadership in the central committees, determines the size of the committees, and apportions their membership according to a statutory formula. Whether this formula is or is not "best calculated to strengthen the party and advance its interests," *Ripon Society Inc.*, 525 F.2d at 585, is irrelevant to First Amendment analysis. *See Tashjian*, 107 S. Ct. at 554. It is the right of the party, not the State, to decide how the party shall be governed. *See id.*

In stacking the deck heavily in favor of elected officials and party nominees, the legislature has dictated to each ballot-qualified party an organizational structure that may not be the party's choice. For example, a party trying to adapt to changing conditions may have interests that differ from the interests of entrenched incumbents. Commentators have noted that the pro-incumbent composition and unwieldy size of California's state central committees have made them "fairly rigid organization[s] incapable of adjusting and responding to changing conditions." *California Politics*, *supra* at 186.

The experience of the Libertarian party exemplifies the plight of a political party forced to operate under state-mandated rules of governance. When the Libertarian party qualified for the ballot, it was forced to jettison its "preferred and natural" party organization and replace it with one already mandated for one of the existing quali-

fied parties.[23] *See* Declaration of Mary Gingell. After adopting the rules of the Peace and Freedom Party as the least objectionable interim model, the Libertarians drafted a body of rules specifically tailored to their party's distinctive needs. When presented to the legislature, the proposed rules languished and died in committee. *See id.* Thus, the Libertarian party has been compelled by the state to organize itself in a way considered inimical to its political interests.

[9] Moreover, we believe that the challenged statutes directly interfere with the parties' free expression by inevitably coloring the message that the parties communicate to the electorate. *See Tashjian*, 770 F.2d 265, 282 (2d Cir. 1985) ("in light of the intimate relationship between the structure of a political association and the message ultimately transmitted by that group, . . . the inexorable effect of [regulating the structure of political parties] is to alter the Party's message"), *aff'd* 107 S. Ct. 544(1986). By favoring incumbents, the California legislature may give ballot-qualified parties a proincumbent image that impedes their associational goals.[24] For instance, a party's efforts

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[23]Parties that newly qualify for the ballot by demonstrating adequate electoral strength under Cal. Elec. Code § 6430 are required to conform their operations to the statutory blueprint prescribed for one of the existing ballot-qualified parties. *Id.* § 9995. The Libertarian party qualified in 1980. Declaration of Mary Gingell.

[24]Commentators have noted that mandatory organizational provisions damage a party's freedom to determine its own message. See Weisburd, *Candidate-Making and the Constitution*, *supra* at 260-61 ("requiring a particular form of party organization can prevent party adherents from attaining objectives inconsistent with that required form of organization"); *cf.* Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L. J. 117, 126 (1984) ("a political party's ability to define its boundaries cannot be separated from the party's ability to determine its political ideology").

to change political course may be frustrated by the incumbent bias inherent in its organizational structures. We do not intend to say that elected officials and party nominees are incapable of providing strong and effective leadership. What we do intend to say is that when the state restricts a party's freedom to choose its leadership, the state burdens the party's First Amendment rights.

The parties' associational right to choose their own leadership is also burdened by the single-term limit on committee chairs. In limiting committee chairpersons to one two-year term — regardless of their popularity and effectiveness — the legislature has impaired the parties' ability to commit their fortunes to experienced and successful leadership. As Judge Patel recognized below, parties are "gravely weakened if the members are not permitted to make use of an able leader for a long enough period of time to ensure effective administration." *San Francisco County Central Committee v. Eu*, No. C-83-5599 at 20 (Order filed May 3, 1984).

In short it seems clear to us that if "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association,'" *Tashjian*, 107 S. Ct. at 549 (quoting *Wisconsin ex rel. La Follette*, 450 U.S. at 122), then *a fortiori* that same political freedom necessarily presupposes the freedom to identify the people who *run* the association. Thus, in holding that the First Amendment rights of the Republican Party and its members to reach out to non-members were infringed by a law preventing independents from voting in Republican primaries, the Court in *Tashjian* provided fresh authority for our holding that the First Amendment rights of political parties

and their members to choose their own leaders are infringed by laws prescribing the membership and terms of parties' governing bodies. We note in particular that the Court found the associational interests at stake in *Tashjian* substantial even though the only obstacle facing independent voters who wanted to vote in Republican primaries was the requirement that they register Republican on the day of the primary. 107 S. Ct. at 550 n.7. In this case, by contrast, the associational interests at stake seem even more substantial because a political party cannot freely choose its own leaders without losing its place on the ballot.

B

Having concluded that the challenged statutes burden appellees' First Amendment rights, we turn to "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789.

The State claims that it has a compelling interest in sheltering the parties from factional strife so that the governing committees will be in a strong position to carry out their statutory responsibility of running the general election campaigns of party nominees. This interest in avoiding factionalism, the argument goes, justifies state interference with the associational rights of political parties and their adherents. The State further claims that unless statutes determine the composition of the parties' governing bodies for the parties, those parties will be so divided by internal political battles for control of the governing bodies that the parties will be unable to run effective campaigns in the general election. The State argues that vesting control of the state committees in elected officials and

party nominees assures that the committees will be broadly representative and resistant to factionalism.

The State also cites its professed interest in restraining factions as a justification for limiting the terms of party chairs. The State maintains that when the term limitation is combined with the statutory requirement that chairs rotate between northern and southern California, friction between these distinct regional interests is minimized.

In sum, the State argues that the Elections Code provisions regulating the membership of party governing committees and limiting the terms of committee chairs serve the state's assertedly compelling interest in avoiding "splintered parties and unrestrained factionalism," *Storer v. Brown*, 415 U.S. 724, 736 (1974); *see also Tashjian*, 107 S. Ct. at 553. In advancing this argument, the State misperceives the nature of the state interest recognized as compelling in *Tashjian* and *Storer*. To be sure, in *Storer* the Court recognized that a state has a compelling interest in "the stability of its political system," 415 U.S. at 736. But, as the Supreme Court pointed out in *Tashjian*, "[t]he statute in *Storer* was designed to . . . . prevent the disruption of political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates." *Tashjian*, 107 S.Ct. at 553-54.

[10] This distinction between disruption from within and disruption from without, which the Court so clearly delineated in *Tashjian* as a basis for distinguishing *Storer*, is the distinction that the State fails to come to grips with in this case. The California statutes under attack make no effort to prevent the disruption of political parties

and their members to choose their own leaders are infringed by laws prescribing the membership and terms of parties' governing bodies. We note in particular that the Court found the associational interests at stake in *Tashjian* substantial even though the only obstacle facing independent voters who wanted to vote in Republican primaries was the requirement that they register Republican on the day of the primary. 107 S. Ct. at 550 n.7. In this case, by contrast, the associational interests at stake seem even more substantial because a political party cannot freely choose its own leaders without losing its place on the ballot

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party nominees assures that the committees will be broadly representative and resistant to factionalism.

The State also cites its professed interest in restraining factions as a justification for limiting the terms of party chairs. The State maintains that when the term limitation is combined with the statutory requirement that chairs rotate between northern and southern California, friction between these distinct regional interests is minimized.

In sum, the State argues that the Elections Code provisions regulating the membership of party governing committees and limiting the terms of committee chairs serve the state's assertedly compelling interest in avoiding "splintered parties and unrestrained factionalism," *Storer v. Brown*, 415 U.S. 724, 736 (1974); *see also Tashjian*, 107 S. Ct. at 553. In advancing this argument, the State misperceives the nature of the state interest recognized as compelling in *Tashjian* and *Storer*. To be sure, in *Storer* the Court recognized that a state has a compelling interest in "the stability of its political system," 415 U.S. at 736. But, as the Supreme Court pointed out in *Tashjian*, "[t]he statute in *Storer* was designed to . . . . prevent the disruption of political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates." *Tashjian*, 107 S.Ct. at 553-54.

[10] This distinction between disruption from within and disruption from without, which the Court so clearly delineated in *Tashjian* as a basis for distinguishing *Storer*, is the distinction that the State fails to come to grips with in this case. The California statutes under attack make no effort to prevent the disruption of political parties

from forces *outside* the party; rather they intrude directly on *internal* party affairs by dictating who can serve on the various state central committees. Indeed, it would seem that if any issue involves the internal workings of a political party, it is the process of selecting the party's leadership.

Rather than explaining how the statutes serve a compelling interest by actually preventing disruption from an outside force, the State seems content to argue mainly that its regulation of internal party affairs is not illegitimate because the bylaws of all the parties' state central committees in fact conform with the statutory requirements.[25] This argument rehashes the standing argument discussed above, *see supra* at 17-19, and we again reject

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[25]The State's use of *Marchioro v. Chaney*, 442 U.S. 191 (1979), to support the challenged governance provisions outstrips the limited rationale of that case. In *Marchioro*, the State of Washington attempted to require that the state central committee be composed in a represenative fashion. The authorizing statute empowered the central committee to perform certain limited duties, such as calling party conventions and filling vacancies on the party ticket. In addition, the charter of the Democratic Party delegated to the committee considerable responsibility in raising funds, recruiting candidates, and setting general policy. The plaintiffs, would-be committee members who were elected pursuant to a charter amendment that sought to supplement the membership stipulated by state law, sued to enjoin their exclusion based on the statute on the ground that a party policymaking body enjoyed a First Amendment exemption from state regulation. The Supreme Court dismissed the plaintiffs' claim without resolving the constitutionality of the Washington regulation. The Court noted that the party freely delegated the committee powers upon which the plaintiffs predicated their challenge; and plaintiffs did not oppose the committee's performance of its state-imposed duties. *Id.* at 197-98. Thus, the Court held that the source of the plaintiffs' grievance was the party's exercise of its right of self-governance, not state interference with that right. *Id.* at 199.

the State's assertion that political parties have no standing to challenge statutes restricing their First Amendment rights unless they first adopt bylaws that conflict with the statutes. Moreover, this argument also fails to recognize that once an infringement of First Amendment rights is demonstrated, the government has the burden of showing a compelling state interest. *See* 107 S. Ct. at 550. Even if the State could prove that the parties would have voluntarily adopted the same rules of governance in the absence of the statutes, the State's burden to show a compelling interest would hardly be met. Indeed, it would seem perverse to hold that a compelling state interest is advanced by regulations that have no effect on those regulated. At any rate, it is hard to see what state interest is served by statutes that require parties to organize themselves in a prescribed way unless those statutes prevent the parties from organizing themselves differently. Even if no party at the present time wished to adopt rules in conflict with the statutes, the State's interest in preventing any party from doing so in the future would hardly be considered either compelling or even legitimate under *Tashjian*.

In short, the State's defense of its statutes forces it to take a paradoxical position. To show that the statutes advance a compelling interest, the State must show that the statutes actually accomplish something by forcing the parties to adopt rules they otherwise would not adopt. But in its attempt to show that the statutes do not illegitimately intrude on internal party decision-making, the State must argue that the parties would have adopted the same rules in the absence of the statutes. In making these arguments, the State never attempts to explain why, even if

it were correct in its judgment that the rules of governance prescribed by the statutes best served the interests of the various parties, the parties could not adopt those rules voluntarily.[28] Underlying the State's paradoxical position seems to be a paternalistic assumption that, left to their own devices, parties will act in a manner adverse to their own interests. We have no trouble concluding that the First Amendment forecloses paternalistic state action designed to protect parties from choosing rules of governance that may prove to be harmful to party interests. Freedom to choose includes the right to choose unwisely. That was made resoundingly clear by the Supreme Court in *Tashjian*:

> The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of United States v. Wisconsin*, 450 U.S., at 123-24, 101 S.Ct., at 1019-1020 (footnote omitted). The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

107 S. Ct. at 554.

[12] Moreover, any state regulation of political parties beyond that necessary to further orderly elections must be

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[28]The State does assert that the statutes are necessary to allow political parties to enforce their organizational rules in court but does not explain why judicial enforcement is necessary to advance any state interest. Nor does the State explain why a statute providing for judicial enforcement of parties' rules, which left the content of those rules up to the parties, would not be a less restrictive alternative.

viewed with great skepticism. To be sure, some state regulation that affects political parties serves a compelling interest in protecting "the integrity of the electoral process." *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973). As the Supreme Court said in *Storer*, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." 415 U.S. at 730. Thus, a state may restrict access to the ballot. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972) (a state "has a legitimate interest in regulating the number of candidates on the ballot"). Toward this end, a state may require that candidates meet minimum standards to qualify for the ballot in order to keep "its ballots within manageable, understandable limits." *Lubin v. Panish*, 415 U.S. 709, 715 (1974). For example, independent candidates may be required to present nominating petitions that demonstrate "a significant modicum of [electoral] support." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *see also American Party of Texas v. White*, 415 U. S. 767, 782 (1974). A state may also require the payment of filing fees to weed out spurious candidacies, *see Bullock*, 405 U.S. at 145, so long as the fees are not excessive or a bar to indigent candidates. *Lubin*, 415 U.S. at 717-18. Further, a state may protect the integrity of its primary elections by imposing a waiting period before voters can switch their registered party affiliation, *Rosario*, 410 U.S. 752 (1973), and before candidates registered with one party can renounce their affiliation to run as independent candidates. *Storer*, 415 U.S. 724 (1974).

It is equally clear, however, that our deference to a state's interest in orderly elections must be tempered by

the risk that state regulation will favor some parties and some party factions over others. For example, a state's interest in "the stability of its political system", 415 U.S. at 736, does not extend to state regulation that effectively restricts the ballot to the major parties or that ensures that the major parties remain ballot-qualified. *Williams*, 393 U.S. at 32; *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979). As the Supreme Court noted in a related context, "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362. Thus, although a state's interest in orderly elections allows it to impose reasonable, non-discriminatory restrictions on ballot access, a state may not go to bat for political parties to assure that they remain ballot-qualified. In other words, a state has no interest in regulating political parties for the purpose of helping them win or retain voter support. Political parties are nothing more than voluntary associations of individuals who band together in pursuit of shared political goals. A party's survival depends upon its ability to compete in the free marketplace of political ideas and ideals. The First Amendment limits states to a neutral role in that competitive process. A state may not interfere with the associational rights of political parties beyond what is necessary to assure honest and orderly elections.

[13] In short, a state's interest is in orderly elections, not orderly parties, and it may regulate political parties only as an incident to regulating elections. Moreover, although under *Tashjian* a state's interest in orderly elections can sometimes justify laws that protect parties from disruption, it can do *so only* if that disruption comes from

outside the party. *See supra* at 35. Thus, the State's arguments in this case fail on two counts. Not only does the State fail to show that the statutes at issue prevent outside disruption, the State fails to show that the promotion of party harmony assertedly advanced by the statutes has anything to do with the State's interest in orderly elections. Any state involvement in promoting party harmony inevitably poses the risk that a state will favor one party or one faction within a party over another. After all, "the views of the State . . . to some extent represent the views of the one political party transiently enjoying majority power." *Tashjian*, 107 S. Ct. at 554. The risk that a state will favor some factions over others is at its highest, and a state's interest in orderly elections is at its lowest, when a state tries to dictate who will govern each party.

Thus, the State's reliance on *Storer v. Brown* is misplaced. In *Storer*, the Court upheld a California "sore loser" statute that required independent candidates for political office to disaffiliate from their former political party at least one year prior to the party primary. *Storer* recognized that a state's legitimate interest in limiting access to the general election ballot entitles it to reserve that ballot for "major struggles," free of the destabilizing effect of "continuing intraparty feuds." *Storer*, 415 U.S. at 735; *see also American Party of Texas*, 415 U.S. at 781 (a state "may insist that intraparty competition be settled before the general election. . . ."). But critical to the *Storer* holding was that California's disaffiliation provision did not attempt to control intraparty feuding during the primary campaigns. To the contrary the primary was recognized as the forum in which "contending

forces within the party finally settle their differences." *Storer*, 415 U.S. at 735; *see also Anderson*, 460 U.S. at 803 (the *Storer* Court did not "suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters."). Nothing in *Storer* suggests that a state may preempt intraparty feuding to help the parties win elections.

[14] Some intraparty feuding is as inevitable in the process of choosing party officials as it is in the process of choosing candidates to carry a party's banner in the general elections. The State's argument here, that it can prescribe party rules of governance in order to preempt intraparty struggles over questions of party governance, is certainly a far cry from *Storer*, which merely held that a state can regulate the timing of otherwise unregulated intraparty struggles over choosing candidates. In other words, *Storer* recognized that a state's compelling interest in orderly general elections justified requiring that party adherents finally settle their differences over the selection of party candidates a reasonable time before election day. However, government's power to regulate the timing of some intraparty feuds in order to protect general elections from disruption hardly gives government the power to preempt party decision-making in order to protect political parties from the disruption inherent in deciding matters for themselves. Such governmental preemption of party decision-making goes well beyond the government's legitimate interest in orderly elections. Intraparty feuding may indeed weaken and divide a party and result in defeat at the polls, but the government's concern is in an orderly election process, not in helping parties maintain their strength and win elections. The State confuses campaigns

with elections, partisan interests with state interests. We hold, therefore, that no compelling state interest is served by the California Elections Code provisions regulating the membership of party governing committees and limiting the terms of committee chairs.

C

[15] Moreover, even should we assume that the State has a compelling interest in minimizing party factionalism, it has failed to carry its burden of showing "a substantially relevant correlation between the governmental interest asserted." *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. 903, 913 (1986), and the Elections Code sections regulating the selection of state committee members and the term of office of their chairs. We agree with Judge Patel that the State failed to submit "a shred of evidence", *San Francisco County Central Committee v. Eu*, No. C-83-5599, at 22 (Order filed May 3, 1984), in support of its claim that unregulated parties would be more vulnerable to "the predations of faction." Appellants' Supplemental Brief at 44. In opposing plaintiffs' summary judgment motion on the merits, the State relied exclusively on the affidavit of retired Democratic state senator Albert S. Rodda, Jr., a longtime member of the Democratic state central committee. As Judge Patel observed, this affidavit consists of "opinions . . . not based on facts, but on speculations." *San Francisco County Central Committee v. Eu*, at 16. With respect to the provisions that regulate committee governance, Senator Rodda makes the single conclusory statement that they "provide some protection against devices

used by factions to exclude others from participation in party affairs." Affidavit of Albert S. Rodda, Jr.

The Rodda affidavit fails to controvert plaintiffs' declarations concerning the impact that the challenged Elections Code provisions have on political parties. Plaintiffs' declarations demonstrate that these provisions weaken rather than strengthen the leadership of ballot-qualified parties. For example, the provisions regulating state committee membership stifle party debate by overrepresenting elected officials. *See* Declarations of David E. Sturrock and Bert Coffey. Plaintiffs have also shown the difficulty of effecting a change in party leadership because party initiatives are left to the mercy of a slow-moving, possibly recalcitrant legislature. *See* Declaration of Hugh Bone.

Finally, plaintiffs' declarations show that the state's extensive regulation of party leadership discourages able people from taking an active role in party organization and hinders a party's recruitment of new leaders. *See* Declarations of Bert Coffey and Austin Ranney. Although the State claims that the challenged statutes invigorate and democratize the parties, as the Progressives ostensibly set out to do, *see supra* at 8-13, the record demonstrates the opposite: in fact, the parties have become weak and fossilized. Thus, we conclude that the State has failed to demonstrate that the statutes advance its professed interest in strong party leadership.[27]

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[27]Although the State claims that the Progressive' reform of political parties strengthened party leadership, the Attorney General of California once rendered a formal opinion that the reforms reflect the Progressives' intent "to minimize the role of the established party agencies." 23 Ops. Cal. Atty. Gen. at 122

V

Finally, we consider the constitutionality of California's outright ban on partisan preprimary endorsements, Cal. Elec. Code § 11702.[28] Because section 11702 prohibits political speech, the inviolability of which rests at the core of the First Amendment, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 14 (1976): *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), we must subject the section to strict scrutiny, "[W]here . . . a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling.'" *Bellotti*, 435 U.S. at 786 (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)). Moreover, "'the burden is on the government to show the existence of such an interest.'" *Bellotti*, 435 U.S. at 786 (quoting *Elrod*, 427 U.S. at 362). Finally, "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving" its interests. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980).

The State argues that the ban on preprimary endorsements serves two governmental interests that it claims are compelling: (1) protecting the party from factionalism; and (2) protecting primary voters from confusion and undue influence. We will address each interest in turn.

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[28]Until recently, Florida was the only state other than California that forbade partisan preprimary endorsements. See Weisburd, *Candidate-Making and the Constitution*, *supra* at 271 n.343. The Florida statute was held to violate the First Amendment in *Adams v. Reno*, 452 F. Supp. 1166, 1170 (S.D. Fla. 1978), *aff'd* 649 F.2d 342 (5th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

MacGregor Burns, is that party control degenerates into a "personalistic system that caters to irresponsible political campaigning and public service." Thus, as Burns concludes, "taking away the endorsement power strikes at the very core of the party." *See also* Declaration of Eugene Lee ("[a] political party unable to endorse candidates is: by definition, a weak party"); *California Politics*, *supra* at 5 ("[C]alifornia campaigns are highly personalized extravaganzas").

Second, plaintiffs showed that in states that permit partisan primary endorsements, the practice is generally used in a selective, circumspect fashion so as not to endanger party unity. Several affiants experienced in the politics of other states testified that when no candidate has been the clear favorite of the party leadership, the leadership has either refrained from issuing controversial endorsements or endorsed several candidates in the same race. *See, e.g.*, Declarations of Eugene Lee and James MacGregor Burns. Moreover, the ability to issue endorsements has helped party leadership distinguish candidates genuinely allied with the party from candidates who are essentially masquerading as party adherents. In California, conversely, the ban on preprimary endorsements has on occasion allowed hostile candidates to win the party nomination. For instance, in a much-publicized episode discussed in plaintiffs' affidavits, a grand dragon of the Ku Klux Klan campaigned for and won the 1980 Democratic party nomination for Congress in the San Diego area while the Democratic county central committee remained powerless to oppose him. *See* Declaration of Edmond Constantini.

In sum, the State has failed to show that section 11702 serves party cohesion. Thus, even if we considered the State's interest in preventing parties from undermining party cohesion to be compelling or legitimate, we would conclude that the State has failed to show that the interest is furthered by banning preprimary endorsements.

B

The State further claims that the ban on preprimary endorsements is justified by the governmental interests in protecting party adherents from confusion and undue influence when they vote in primaries. The State asserts that voters might be confused if they are not sheltered from the views of party leadership.[30] The State's apparent concern is that voters will be discouraged from participating in the primary election because they will view the party-endorsed candidate as the party's foreordained choice. The State also argues that preprimary endorsements from the party leadership will exert undue influence on party members when they vote in primaries.

[18] With the exception of cases upholding laws carefully tailored to proscribe fraud and corruption, *see, e.g.*, *Buckley*, 424 U.S. at 26-27, the State cites no authority for the proposition that the government can regulate the flow

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[30]Legislative findings preceding § 11702 report "considerable public doubt and confusion" arising from the promulgation of deceptive endorsements. Cal. Elec. Code § 11701(3). The California courts that have enforced § 11702 have stated that minimizing voter confusion was the principal motive behind the enactment. *See People v. Crutcher*, 262 Cal. App.2d 750, 752-53 (Cal. Ct. App. 1968); *California Democratic Council v. Arnebergh*, 233 Cal. App. 2d 425, 430 (Cal. Ct. App. 1965), *appeal dismissed*, 382 U.S. 202 (1965).

of information between political associations and their members. Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information. *See Pacific Gas & Electric*, 106 S. Ct. at 907 ("The First Amendment protects the public's interest in receiving information"); *cf. Brown v. Hartladge*, 456 U.S. 45, 60 (1982) ("[by] *the free exchange of ideas* . . . the people are to choose . . . between candidates for political office") (emphasis added). We cannot accept the State's claim that denying voters access to the views of party leadership somehow enhances their First Amendment rights.

[19] In any case, we would reject the "highly paternalistic approach" of statutes like [section 11702] which restrict what the people may hear." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The State's argument that preprimary endorsements confuse and unduly influence voters rests upon a lack of trust in the ability of voters to think and act for themselves. "But '[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.'" *Tashjian*, 107 S. Ct. at 552 (quoting *Anderson*, 460 U.S. at 797). "[T]he people in our democracy are entrusted with the responsibility for . . . evaluating the relative merits of conflicting arguments . . . . [and] the source and credibility of the advocate." *Bellotti*, 435 U.S. at 791-92; *cf. Police Department v. Mosely*, 408 U.S. 92, 95 (1972) ("government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). "'A State's

claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'" *Tashjian*, 107 S. Ct. at 552 (quoting *Anderson*, 460 U.S. at 798).

Simply put, the State has given voters too little credit. It has made no showing in support of its charge that voters will be confused and overly influenced by party endorsements. In contrast, plaintiffs' affidavits confirm what is implicit in the First Amendment: when the people are exposed to a public debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), they are fully capable of thinking for themselves. Plaintiffs have made a showing that voters understand that endorsements are intended to counsel, not preempt their votes, and that the primary victor alone constitutes the general election candidate of the party. Party endorsements are unrestricted in all other states, *see supra* at n.27; and plaintiffs' affidavits show that the electorate of these states typically considers the party's imprimatur as simply one relevant datum in the pool of information on rival candidates for the party nomination. *See* Declarations of Donald Fraser Malcolm Jewell, and Bert Coffey. Thus, the State's fear that party members will blindly rubber-stamp the party's endorsement is speculation not borne out by either experience or common sense. Moreover, we agree with the Second Circuit that "a state certainly does not have a compelling interest in shielding from confusion those voters who engage in unthinking and Pavlovian reliance on party labels." *Tashjian*, 770 F.2d at 284, *aff'd* 107 S.Ct. 544. To the extent that the risk of confusion arises because the

central committees carry the official imprimatur of the State, the State's own statutes—not the inherent coerciveness of party endorsements—are the root of the problem. California's ban on preprimary endrosements is a form of paternalism that is inconsistent with the First Amendment.

In sum, California's asserted interests—protecting the parties from factionalism and protecting the voters from confusion and undue influence—are insufficient to justify its ban on preprimary endorsements. Accordingly, we hold that section 11702 violates the First Amendment.

CONCLUSION

The judgment of the district court invalidating the provisions of the California Elections Code that regulate the selection of state central committee members, limit the term of office of committee chairs, and prohibit state and county central committees from endorseing, supporting, or opposing candidates in party primary elections is AFFIRMED.

ATTORNEY GENERAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE	)	NO. 84-1851 DC No. C-83-5599-MHP

FOR PARTY RENEWAL,)
)
Plaintiffs-Appellees,)
)
v.)
)
MARCH FONG EU, Secretary) (Filed
of State of the State of) Nov. 19, 1987)
California; JOHN VAN DE)
KAMP, Attorney General of the)
State of California; ARLO)
SMITH, District Attorney of San)
Francisco County, et al.,)
)
Defendants-Appellants.)
)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendant-appellant March Fong Eu, Secretary of State of the State of California, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Ninth Circuit entered on October 29, 1987 affirming summary judgment against defendants entered by the U.S. District Court, Northern District of California.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: November 18, 1987

JOHN K. VAN DE KAMP
Attorney General of the State
California

N. EUGENE HILL
Assistant Attorney General

/s/ Geoffrey L. Graybill
Deputy Attorney General

Attorneys for Defendants-
Appellants

1515 K Street
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone (916) 324-5465

DECLARATION OF SERVICE BY MAIL

Case Name: San Francisco Co. Democratic Central Comm., et al., v. March Fong Eu — No. 84-1851

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, P. O. Box 944255, Sacramento, California 94244-2550.

On November 18, 1987, I served the attached

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

PAUL FLUM
MORRISON & FOERSTER
Attorneys at Law
California Center
345 California Street
San Francisco, California 94104-2105

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on November 18, 1987.

Carol Clanton /s/ Carol Clanton
(Signature)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL, Plaintiffs-Appellees, v.	NO. 84-1851 DC NO. C-83-5599-MHP

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; LEO HIMMELSBACH, District Attorney of Santa Clara County; ARLO SMITH, District Attorney of San Francisco County, et al.,

Defendants-Appellants.

AMENDED
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendants-appellants March Fong Eu, Secretary of State of the State of California; John K. Van de Kamp, Attorney General of the State of California; Leo Himmelsbach, District Attorney of Santa Clara County and Arlo Smith, District Attorney of San Francisco County, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Ninth Circuit entered on August 18, 1987 as amended on October 29, 1987 affirming summary judgment against defendants entered by the U.S. District Court, Northern District of California.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

DATED: January 13, 1988.

JOHN K. VAN DE KAMP
Attorney General of the State
of California

N. EUGENE HILL
Assistant Attorney General

/s/ Geoffrey L. Graybill
Deputy Attorney General

Attorneys for Defendants-
Appellants

1515 K Street
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone (916) 324-5465

DECLARATION OF SERVICE BY MAIL

Case Name: San Francisco Co. Democratic Central Comm., et al., v. March Fong Eu, et al. No. 84-1851

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, P.O. Box 944255, Sacramento, California 94244-2559.

On January 13, 1988, I served the attached

(Date)

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

PAUL FLUM
MORRISON & FOERSTER
Attorneys at Law
California Center
345 California Street
San Francisco, California 94104-2105

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on January 13, 1988.

(Date)

Marsha L. Bierer
(Typed Name)

/s/ Marshal L. Bierer
(Signature)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE, SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE, LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE, et al.,	)	NO. 84-1851 DC CV 83-5599 MHP
Plaintiffs-Appellees.	)	
vs.	)	(filed November 17, 1987)
MARCH FONG EU, Secretary of the State of the California, JOHN K. VAN DE KAMP, Attorney General of the State of California, et al.,	)	
Defendants-Appellants.	)	

ORDER ON MOTION FOR STAY OF MANDATE

(Rule 41 (b) Fed.R.App.P.)

Upon due consideration of appellants motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before January 27, 1988,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby denied.*

/s/ William A. Norris
United States Circuit Judge

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* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

SAN FRANCISCO DEMOCRATIC CENTRAL COMMITTEE et al. v. MARCH FONG EU et al.

Table of Code Provisions
Regulating California Democratic Party Organizations
Not Challenged or
Invalidated In This Litigation

Elections Code	§ 8660.1	Requires state central comm. to notify members of their appointment
	§ 8660.2	Prescribes the form of the notice
	§ 8660.3	Provides that party's former statewide officeholders are members of the state central comm.
	§ 8662	Establishes basis for membership for member who qualifies on more than one basis
	§ 8666	Provides for method of authentication of membership
	§ 8668	Requires county central comm. chairs to notify state central comm. of identity of county comm. members
	§ 8670	Requires state chair to notify each state comm. member of his membership & to inform them of prescribed proxy system
	§ 8671	Requires current party affiliation for membership

§ 8672	Authorizes state central comm. to remove a member who disaffiliates or supports a nominee of another party
§ 8673	Defines the cirmustances in which a vacancy in membership exists
§ 8674	Prescribes methods of filling vacancies on state central comm.
§ 8675	Additional methods of filling vacancies
§ 8676	Requires state central comm. to provide forms for appointment of members
§ 8677	Authorizes state cen. comm. members to appoint three associate members
§ 8678	Requires that members be registered voters
§ 8710	Prescribes the date time and place of the first meeting of the state cen. comm. after a general election
§ 8711	Provides method for selection site for meeting of state cen. comm.
§§ 8740-8744	Prescribes method of attendance at state cen. comm. by proxy
§ 8770	Prescribes order of business for state cen. comm. meetings

§ 8771	Requires immediate appointment of a comm. on proxies and credentials
§ 8772	Requires selection of officers and empowers such officers
§ 8773	Authorizes state cen. comm. to delegate any of its powers to an executive comm.
§ 8774	Requires that the chair and vice chair be from the same section of the state and that the chair alternate between the southern and northern sections of the state
§ 8775	Authorizes comm. to prescribe dues for its members and to remove members for nonpayment
§ 8776	Requires state cen. comm. to conduct the party's campaign for its nominees in the general election
§ 8777	Prescribes quorum of comm. as majority of entire membership
§ 8778	Authorizes comm. to choose a manual of parliamentary procedure
§§ 8820-8823	Prescribe number of members of county cen. comms.

§ 8823	Authorizes county cen. comms. to establish member districts and requires reapportionment thereof every decade
§§ 8824-8825	Provide full membership in county cen. comms. for resident nominees of the party
§ 8826	Authorizes appointment of alternates
§ 8827	Requires members of county cen. comms be affiliated with party at time of election or appointment
§ 8827.5	Allows member between ages of 18-21 not to be affiliated with the party although member must be registered to vote
§ 8828	Requires each county cen. comm. member to take and subscribe to the oath provided in Calif. Const.
§ 8829	Defines vacancy to include case where insufficient number of members are elected from a district
§ 8830	Further defines circumstances in which a vacancy occurs on a county cen. comm.
§ 8831	Authorizes removal of a county cen. comm. member who has more than 3 consecutive unexcused absences from meetings

§ 8832	Mandates that change of residence from district results in automatic resignation from county cen. comm.
§ 8823	Authorizes removal of county cen. comm. member who affiliates with another party or advocates election of member of another party
§ 8834	Specifies procedure to be followed after an appointment filling a vacancy
§ 8870	Requires election of a county cen. comm. at every direct primary election
§ 8871	Requires county clerk to compute the number of members of county cen. comm. to be alloted to each district
§ 8872	Requires candidates for county cen. comm. to file nomination papers per Code signed voters of district
§ 8873	Provides that where number of candidates for county cen. comm. do not exceed the number of members alloted to district the candidates are deemed elected
§ 8874	Prescribes requisite number of votes required for election to county cen. comm.

§ 8875	Provides that a vacancy occurs if a candidate dies on or before election when such a candidate is elected
§ 8920	Prescribes date and place for first meeting of county cen. comms.
§ 8921	Allows L.A. county cen. comm. to have first meeting in centrally located public auditorium
§ 8922	Mandates state Department of General Services to allow any county cen. comm. to hold one meeting per month in a state building without charge
§ 8923	Requires county cen. comm. meetings be accessible to physically handicapped
§ 8940	Requires county cen. comm. to conduct party campaign under direction of state cen. comm.
§ 8941	Validates rules adopted by county cen. comms. prior to enactment of this section and authorizes adoption of rules for specific purposes
§ 8942	Provides term of county cen. comms. and authorizes services for benefit of the party

§ 8943	Authorizes majority of county cen. comm. members to call a meeting on default by chairperson
§ 8944	Requires county clerk to identify the newly elected chair of a county cen. comm. and to notify the Secretary of State thereof
§ 8945	Authorizes county cen. comms. to establish member dues not to exceed $24

No. .....

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1987

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; LEO HIMMELSBACH, District Attorney of Santa Clara County;

Appellants,

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

DECLARATION OF CHARLES H. BELL, JR.

I, Charles H. Bell Jr., declare as follows:

1. I am a partner in the law firm of Nielsen, Merksamer, Hodgson, Parrinello and Mueller which provides general counsel to the State Central Committee of the California Republican Party. I am the partner principally responsible for performing the duties of general counsel to the Republican State Central Committee.

2. I have been authorized by the chairperson of the State Central Committee to provide this declaration concerning the activities of the Committee on the issue of pre-primary endorsements by official party organizations.

3. The Committee's Task Force on Political Reform, Elections and Reapportionment has submitted some recommendations to the rules committee concerning policy on pre-primary endorsements by official party organizations. A true and correct copy of the recommendations is attached hereto as Exhibit A.

3. The rules committee has authorized preparation of proposed amendments to the by-laws of the Committee pursuant to the recommendations of the Task Force.

4. The rules committee will consider approval of the proposed amendments for submittal to and adoption by the full State Central Committee just prior to the meeting of Committee on February 19-21, 1988.

I declare under penalty of perjury that the foregoing statements are true and correct of my personal knowledge.

Executed at Sacramento, California on January 26, 1988.

/s/ CHARLES H. BELL, JR.

EXHIBIT A

RECOMMENDED ENDORSEMENTS POLICY FOR THE CALIFORNIA REPUBLICAN PARTY

The Task Force on Political Reform, Elections and Reapportionment, having duly considered the Ninth Circuit Court of Appeals' decision *San Francisco Democratic Central Committee v. Eu*, 826 F.2d 814 (9th Cir. 1987), and the advice and opinions of Party regulars, affiliated volunteer associations and elected Republican officials and their staff, hereby recommends that the California Republican Party, (hereinafter "Party"), through its State Central Committee, adopt the following policies by appropriate amendments to its Bylaws and Rules, regarding the subject of endorsing candidates for elected partisan offices:

1. The California Republican Party and its State and County Central Committees shall not endorse, support or oppose any candidate for elected partisan office, except in special elections (hereinafter the "No Partisan Endorsements Rule").

2. The No Partisan Endorsements Rule shall:

a) be adopted as a permanent Bylaw by all the Party's State and County Central Committees;

b) be incorporated as part of a charter to be issued by the Party's State Central Committee to each Party County Central Committee;

c) not be waived or suspended by any Party County Central Committee; and

d) not be waived or suspended by the Party's State Central Committee, except at its biennial organizational meeting for no longer than the succeeding two year period, and then only by a favorable vote

of at least 66-2/3% of a quorum of members of the Committee present in person or by proxy.

3. In the event any Party County Central Committee violates the No Partisan Endorsements Rule, the State Central Committee may impose sanctions on the County Committee, including but not limited to:

a) Public announcement by the Chairman or other designated official of the State Central Committee that the endorsement in question was unauthorized and void;

b) An injunction enjoining the County Committee(s) and candidate(s) involved from publicizing the endorsement, and compelling the Committee to set aside its unauthorized endorsement; or

c) Revocation of the County Committee's Charter and its right to use the name "Republican" as part of its title.

4. In the event the Party's State Central Committee waives or suspends the No Partisan Endorsement Rule, the following procedures will apply to partisan endorsements during the time of the waiver or suspension:

a) The Party may exercise its authority to endorse or oppose a candidate for elected partisan office only by a favorable vote of at least 66-2/3% of a quorum of members of the applicable Central Committee(s) present in person or by proxy.

b) The State Central Committee shall not endorse or oppose any candidate for partisan elected office at the legislative or local level unless and in concurrence with the County Central Committee(s) having jurisdiction over the affected district.

c) County Central Committees will not endorse, or oppose any candidate for partisan state-wide office,

or any candidate for other elected partisan office who does not represent part or all of that county. Where the holder of the office would represent more than one county, no County Central Committee may endorse or oppose a candidate for such office unless all County Central Committees having jurisdiction in part or in whole within the affected district concur in the endorsement, support or opposition.

d) Endorsement or opposition will not be made until after notice is given and a hearing is offered to the affected candidates.

5. The Party may endorse or oppose any Republican candidate running for partisan elected office in a special election in accordance with the following procedure:

a) During the — days after the Secretary of State announces the special election,

6. The County Central Committee or Committee having jurisdiction over the district involved may endorse or oppose any Republican candidate for the office by a favorable vote of at least 66-2/3% of a quorum of members present in person or by proxy of each Committee having jurisdiction over any part of said district;

a) Endorsement or opposition will not be made by the County Committee(s) until after notice is given and an opportunity to be heard is offered eo the announced candidates; and

c) In the event the County Central Committee or Committees having jurisdiction over the district involved do not endorse or oppose a candidate within —days of the announcement of the election, the State Central Committtee, by a vote of at least 75% of a quorum of its Board of Directors, may endorse or oppose any Republican candidate for the office.

No. ————

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; LEO HIMMELSBACH, District Attorney of Santa Clara County;

Appellants,

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SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

DECLARATION OF BRIGITTE TERI BURNS

I, Brigitte Teri Burns, declare as follows:

1. I am a member of the executive board of the State Central Committee of the California Democratic Party.

2. I was present and participated in the action of the executive board on January 9, 1988, when it adopted amendments to the by-laws of the Committee regarding pre-primary endorsements.

3. I was informed of the complete text of the amendments prior to the vote thereon by the board.

4. Exhibit A attached hereto is a true, correct and complete copy of the amendments to the by-laws concerning pre-primary endorsements which were adopted on January 9, 1988.

I declare under penalty of perjury that the foregoing statements are true and correct of my personal knowledge.

Executed at Sacramento, California on January 26, 1988.

/s/ Brigitte Teri Burns

EXHIBIT A

ARTICLE —

Endorsement of Candidates for
Partisan and Nonpartisan Office

Section 1. PRESIDENT OF THE UNITED STATES

a. The State Central Committee of the California Democratic Party, Democratic County Central Committees, and all official units of the California Democratic Party shall not endorse candidates for President of the United States or candidates for delegates to the Democratic National Convention until the Democratic National Convention has been held.

b. Individual members of the organizational units identified in subsection (a) of this section are in no way precluded from endorsing a candidate for the Democratic presidential nomination or candidates for delegates to the Democratic National Convention. The party office of members making such an endorsement may be indicated in that endorsement for identification purposes only.

Section 2. PARTISAN PUBLIC OFFICES OTHER THAN PRESIDENT

a. Endorsement of candidates for the Democratic nomination to any partisan office other than President shall take place during a duly noticed "endorsing convention" of This Committee held after the closing date for filing declarations-of-intent-of-candidacy for the offices to be voted upon. (See subsection (c) below for an exception to this provision.)

b. This Committee shall make every reasonable effort to assure that with respect to each and every office embraced by the provisions of the subsection (a) above there shall be at least one candidate who has filed, who wishes the party's endorsement, and who is worthy of consideration for that endorsement.

c. Endorsement in any given primary race shall be made by an "endorsing caucus" of members of This Committee resident in the geographic area covered by the office in question and shall be subject to ratification by the full membership of This Committee, except in the case of the Board of Equalization which shall be treated as a state wide office.

1) Endorsing caucuses shall be chaired by persons designated by the Chair of This Committee. In addition to presiding over the endorsing caucus in conformity with these bylaws and with the principles of fairness to which this Party is committed, persons designated as Chairs shall be responsible—upon the advice and assistance of the State Chair--for publicising, in the relevant local media of communication, the results of the endorsing and ratifying process with respect to the candidate(s) considered by the caucus he/she chairs.

(2) Endorsing caucuses shall be held at places and times during the endorsing convention which are designated by the Chair of This Committee consistent with achieving an orderly, convenient and fair process.

(3) Each candidate entered in a forthcoming Democratic primary and subject to the provisions of this section may request to be considered for the Democratic Party

endorsement, and may request to appear before the relevant endorsing caucus.

(4) Each candidate seeking the endorsement of the California Democratic Party shall submit to This Committee, in advance of the endorsing convention, a nonreimbursable filing fee of $100 in the case of statewide public offices and $50 in all other cases. (see Article X: Sec. 4, By-Laws and Rules of the California Democratic Party 1985-87)

(5) Fifty percent plus one of the credentialed members of an endorsing caucus shall constitute a quorum.

(6) Voting at all the endorsing caucuses shall be by a roll call vote.

(7) Members of an endorsing caucus shall be presented with a "no endorsement" option on all endorsement votes.

(8) No endorsing caucus may endorse more candidates than there are seats for the office in question.

(9) Endorsement of an incumbent candidate seeking reelection shall require a vote of simple majority (50%+1) of the caucus members present and voting. Endorsement of all non-incumbent candidates shall require 60% of those caucus members present and voting. In the event that on a given endorsing vote neither a candidate nor a "no endorsement" receives the required majority, then a new vote shall be taken wherein the name of any withdrawn candidate or, if none has withdrawn, the name of the candidate with the lowest number of votes on the previous vote shall no longer be put before the members of the endorsing

caucus. Before any vote, each candidate shall be given an opportunity to withdraw in favor of some other candidate.

d. Decisions of the endorsing caucus shall be subject to ratification by the full membership of This Committee, except with respect to candidates for statewide public office.

(1) In the case of a statewide public office, This Committee's ratification of the endorsing caucus' decision shall be assumed, since the endorsing caucus is comprised of all members of This Committee.

(2) Ratification of endorsing caucus decisions on which no objection has been filed under the provisions of (3) below may be achieved by a vote of Acclamation which embraces as many such decisions as deemed appropriate by the Chair of This Committee.

(3) Formal objection to the ratification of an endorsing caucus decision must be signed by at least 200 credentialed members of This Committee and filed with the State Chair one hour in advance of the period set side for ratification votes.

(4) Consideration by This Committee of endorsing caucus decisions to which objection has been filed under (3) above shall occur prior to voting on the ratification of other caucus decisions and shall include the presentation of arguments for and against ratification.

(5) In the event fifty percent plus one of the members of This Committee present and voting fail to vote to ratify an endorsing caucus decision to which formal objection has been filed, the endorsing caucus decision shall be considered "vacated."

(6) The California Democratic Party shall be considered to have made "no endorsement" where a caucus decision has been vacated unless the members of This Committee decide to endorse a substitute candidate.

(a) Substitute candidates may be nominated from the floor immediately following the vacating of the relevant endorsing caucus.

(b) Substitute candidates must have been considered for endorsement by the relevant endorsing caucus.

(c) To become the endorsed candidate of the California Democratic Party a substitute candidate must receive 75% of the vote of the members of This Committee present and voting.

e. In the case of a special election where an endorsement cannot be made at the biennial endorsing convention of the California Democratic Party, the Chair of This Committee shall convene an endorsing caucus of the members of This Committee resident in the relevant district. Such caucus shall proceed in accordance with the relevant procedures provided for in the subsection (c) above and its decision shall be subject to ratification by the Executive Board of This Committee under procedures consistent with those identified in Subsection (d) above.

f. Only Democratic candidates for nomination to partisan public office who have been endorsed in accordance with the foregoing provisions shall be deemed official candidates of the California Democratic Party and be entitled to the privileges and benefits associated therewith.

g. To assure the effectiveness of the Democratic Party's endorsing process, This Committee: (1) hopes and expects that all of its members will make every reasonable effort to recruit and encourage persons of the highest quality to seek the Party's nomination and endorsement in races for partisan public office; (2) hopes and expects œthat all of its members will make every reasonable effort to see that endorsed candidates receive the Party's nomination and, in due course, are victorious in the general election; (3) hopes and expects that all of its members will make every reasonable effort to see that those aspirants for the Party's endorsement who fail to receive that endorsement withdraw as candidates in the Democratic primary and encourage a unified effort on behalf of the endorsed candidates; and (4) intends to protect the integrity of its endorsing power by precluding—including through the use of legal process—other entities from representing themselves as purveyors of an official Democratic Party endorsement.

h. To assure the effectiveness of the Democratic Party's endorsing process, This Committee is committed to the principle that the Democratic Party as an organization shall speak with one voice with respect to the endorsement of candidates for nomination to partisan public office. It is also committed to the principle that it (The State Central Committee of the Democratic Party) shall be broadly and fairly representative of the various components of the Party.

(1) The Executive Board of This Committee shall consider and may approve a request for a variance from these provisions submitted by a County Central Committee wishing to render an independent endorsement of a 'favorite son'' or ''favorite daughter'' candidate for the Democratic nomination to statewide partisan public office. In the event such a variance is granted, the endorsed candidate shall not be considered, and shall not be presented as the endorsed candidate of the California Democratic Party unless he/she is also endorsed in accordance with the procedures described in the foregoing sections of this Article.

(2) Any official unit or any Democratic County Central Committee of the California Democratic Party which renders an independent, unauthorized endorsement of a candidate for partisan public office shall forfeit its right to representation on This Committee and the privileges and benefits which may be attached thereto for a period of 12 months from the time it renders such an endorsement, or the remainder of the term of the current State Central Committee, whichever is longer.

i. ''Pre-endorsing Conferences'' shall be held at the regional level prior to the State endorsing convention.

(1) The time and place of each pre-endorsing conference shall be determined by the State Chair in consultation with the Party's Regional Directors.

(2) In the event that any Senate District or Congressional District falls into more than one Region, the State Chair shall assign those districts to a single regional pre-endorsement conference for the purposes of making the recommendation set forth in this section, due consideration being given to conflicting conference dates so as to allow for full participation. When an eligible voter in

a Senate or Congressional District does not reside in the designated Region for that office, a written, signed statement from the eligible voter shall be recorded as part of the roll call vote if received by the designated Regional Director prior to the beginning of roll call for the vote in the designated Region.

(3) The State Chair shall be responsible for providing each voting participant with notification of the time and place of the relevant pre-endorsing conference. Regional Directors shall be responsible, upon the advice and assistance of the State Chair, for generally publicizing pre-endorsement conferences.

(4) Each pre-endorsing confetrence shall be chaired by the relevant Regional Director or, in the event that there is no Regional Director available for this purpose or the Regional Director is a candidate for nomination to a partisan public office, by a person designated by the State Chair. The State Chair shall designate a Secretary for each Regional pre-endorsing conference.

(5) Voting participants at each pre-endorsing conference shall be all members of This Committee resident in the district; all County Committee members resident in the district; a representative resident in the district of each Democratic Club or other chartered Party organization with membership in the District. No proxy voting shall be allowed at pre-endorsing conferences. It shall be the responsibility of each Regional Director, with the assistance of the relevant County Committee Chair(s) and Assembly District Committee Chair(s) to identify by name all present who will be eligible voters at his/her regional pre-endorsing conference and to transmit the names

of all such voters to the State Chair, along with the Assembly District, Senate District and Congressional District in which each resides 30 days before the pre-endorsing conference.

(6) Each candidate for the Democratic nomination to a partisan, non-statewide public office whose jurisdiction extends into, or is included in a given Region, shall be permitted to address the the relevant pre-endorsing conference or to designate a representative to address said conference.

(7) Any voting participant may offer for conference consideration the name of a candidate for the Democratic nomination to a partisan, non-statewide public office whose jurisdiction extends into, or is included within the given Region.

(8) Once the names of candidates for a given office have been thus offered, a single roll call vote shall be taken as to the preferences of the eligible voting participants. A "no preference" option shall be available at the time of each vote.

(9) Eligibility to vote with respect to a given office shall be limited to those conference participants resident in the election district in question.

(10) The Chair of the pre-endorsing conference is responsible for transmitting, in writing, the results of all votes taken within three days of the pre-endorsing conference.

(11) A candidate's name may be placed on the consent calendar of This Committee's endorsing convention

upon receiving a 70% vote at a pre-endorsing conference. The consent calendar shall be approved by a simple majority (50%+1). Upon approval of the consent calendar the candidate shall become the endorsed candidate of the Democratic Party.

A name may be removed from the consent calendar by any five (5) members of This Committee resident in the District in question by filing a letter of opposition with the State Chair no later than ten (10) days prior to the State Endorsing Convention. If a name is removed from the consent calendar, the By-laws of This Commttee regarding endorsements shall apply.

j. All winners of the Democratic primaries will be deemed to be the endorsed candidates of This Committee, unless 75% of the members of its Executive Board, present and voting, object.

k. The only form of endorsement of a candidate for Partisan Public Office is an "Official Endorsement" as provided for under these by-laws. Unless a candidate has received an "Offcial Endorsement" all motions of support, recommendation, or other expressions of approval, no matter how denominated, shall be out of order at any meeting of This Committee, its Executive Board, its Regions, its Assembly District Committees or its caucuses.

1. This Committee shall not endorse candidates for County Central Committees.